TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 454

MASTRO PLASTICS CORP. AND FRENCH-AMERICAN REEDS MANUFACTURING CO., INC., PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 19, 1954

CERTIORARI GRANTED JANUARY 10, 1955

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings before The National Labor Relations Board, Second Region	1	1
Transcript of testimony	1	1
Appearances	1	1
Amendment of complaint	2	1
Amendment and answer	4	2
Jurisdictional concession	8	3
Testimony of Abraham H. Saul	11	3
Rose Amoroso	97	82
Vernal Gibson Fine	113	97
Peter Pierom	127	110
Carmen Libutti	146	126
Frank Ciccone	151	130
Jean Bowerman	176	151
Antoinette Radice	183	155
Elizabeth Petrus	186	157
Luis Alfred Cartagena	189	158
Ralph Prieto	200	166

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 18, 1955

—8151

	Original	Page
Proceedings before The National Labor Relations Board, Second Region—Continued		
Testimony of—Continued		
Francisco Tommarello	205	169
Virginia O'Neill	212	173
Estelle Sills	218	177
Ruth Shaw	234	186
Louis Castaldo	237	189
Morris Brender	239	190
Alma Zwiboda	242	194
Virginia O'Neill (recalled)	248	195
Mr. Mario Maccaferri	251	196
Mrs. Maria Maccaferri	267	207
Grace Cincimino	270	207
Max Studli	273	209
William Anthony Ritacco	281	216
Arthur Zevin	284	219
Mr. Mario Maccaferri (recalled)	285	219
Frank Ciccone (recalled)	295	226
Lillie Maddalena	300	228
General Counsel's Exhibits:	308	232
Exhibit 1D—Complaint	308	232
Exhibit 1E—Respondents' Answer to complaint	315	237
Exhibit 2—Agreement, Local 3127 and Mastro, December 1, 1948	322	241
Exhibit 3—Assignment of Agreement to Local 22045, March 7, 1949	334	251
Exhibit 4—Agreement, Local 22045 and Mastro, December 1, 1949	336	253
General Counsel's Exhibits:	359	263
Exhibit 5—Letter, dated September 29, 1950, from Local Union 22045, by S. Rothenberg, to Mastro Plastics Corp.	350	263
Exhibit 7—Letter, dated December 11, 1950, from Mastro Plastics Corp., By Mario Maccaferri, President to Vernal Gibson	351	264
Exhibit 8—Letter, dated March 9, 1951, from A. Roberts Representative to Mastro Plastics Corp.	352	265
Respondents' Exhibits:	354	265
Exhibit 3—Transcript of demands formulated at meetings on or about October 20, or 23, 1950	354	265
Exhibit 13—Notice to employee	355	266
Intermediate Report, June 11, 1952	358	266
Statement of the Case	358	266
Findings of Fact	362	269
Conclusions of Law	439	334

	Original	Print
Proceedings before The National Labor Relations Board, Second Region—Continued		
Statement of Exceptions to the Intermediate Report, August 15, 1952	444	337
Decision and order, March 13, 1953	448	339
Appendix A—Notice to All Employees pursuant to a Decision and Order of the National Labor Relations Board	469	357
Schedule A—List of employees discharged	472	359
Offer of Proof, May 4, 1953, Appendix to Motion to Modify Order and for other Relief	476	360
Proceedings in U.S.C.A. for the Second Circuit	477	361
Petition for enforcement of an Order of the National Labor Relations Board	477	361
Opinion, Chase, C. J.	481	363
Opinion, dissenting in part, Swan, J.	489	370
Order denying petition for rehearing	492	370
Decree enforcing an order of the National Labor Relations Board	494	371
Appendix A—Notice to all employees	497	373
Schedule A—List of employees discharged (copy) (omitted in printing)	499	
Clerk's certificate (omitted in printing)	501	
Order extending time to file petition for writ of certiorari	502	377
Order granting certiorari	503	377

[fol. 1]

BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

In the Matter of

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.

and

LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Case No. 2-CA-1799

Hearing Room 25
2 Park Avenue
New York, New York

STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF MARCH 3, 1952

Met, pursuant to notice, at 10:00 o'clock a. m.

Before: Arthur Leff, Trial Examiner.

APPEARANCES:

Vincent M. Rotolo, Esq., appearing on behalf of the General Counsel, National Labor Relations Board.

Bernard H. Fitzpatrick, Esq., 60 Wall Street, New York, New York, appearing on behalf of the Respondent Company.

Abraham H. Saul, Esq., 130 W. 42nd Street, New York, New York, appearing on behalf of the Charging Union.

. . . . . .

[fols. 2-3] Trial Examiner Leff: Let's do it in two stages: First, I am throwing this out as a suggestion. You amend your complaint by deleting the word "joint" wherever it appears in the provisions of allegation No. 3. Then Mr. Fitzpatrick, on behalf of the respondent, will amend his answer to admit the allegations of paragraph 3 of the com-

plaint, as amended. Then Mr. Fitzpatrick will stipulate that for the purposes of this proceeding he admits that both Mastro Plastics and French-American Manufacturing Co., Inc., are both employers, or were employers, of the employees named in the complaint.

Mr. Fitzpatrick: Yes, we so stipulate.

Mr. Rotolo: I will concede on that.

Trial Examiner Leff: Can the statement made by the Trial Examiner be accepted as a stipulation? In other words, the Trial Examiner deems that the complaint has been amended and the answer has been amended, and the stipulation has been made in the form made by the Trial Examiner.

Mr. Rotolo: That is agreeable, Mr. Examiner.

Mr. Fitzpatrick: Yes.

[fol. 4] Mr. Fitzpatrick: I would be glad to do it. There is one item that I would like to take care of at this time.

Now that you have ruled that I may proceed herein without prejudice to the application to the Board by way of an appeal and to such application as may be warranted to review, I would like to ask leave to amend the answer to assert a defense grounded upon Section 8(d) of the Act. Actually, it would be alleged in two paragraphs. It would be as follows: The first paragraph to read "We reallege the provisions of Section 7 and 8 of the answer."

Mr. Rotolo: Paragraph 7 and 8?

Mr. Fitzpatrick: That is right. That would be our No. 13. No. 14: that on or about the 29th day of September 1950—

[fols. 5-7] Mr. Rotolo: That is Paragraph 14.

Trial Examiner Leff: Is that September?

Mr. Fitzpatrick: September, yes.—Local Union 22045, then bargaining agent for the employees mentioned in the complaint, served upon the Respondents a written notice of the proposed termination or modification of the contract referred to in Paragraph 8 hereof; and Paragraph 15, that the employees herein, respecting whom the complaint alleges a discriminatory discharge, engaged in a strike upon the 10th day of November, 1950, and have not been re-employed by the Respondents.

Trial Examiner Leff: Do you want to be heard on that motion?

Mr. Rotolo: We contend that the action of the employees on November 10 was not a strike; consequently——

Trial Examiner Leff: What I have before me is to grant the motion to amend; do you have any objection?

Mr. Rotolo: I have no objection.

Trial Examiner Leff: The motion to amend the answer in the respects stated by counsel for the Respondents is hereby granted.

[fol. 8] Mr. Rotolo: I should like to call your attention to the fact that the factual questions as to commerce have been admitted by the answer, and for that reason, no evidence as to commerce will be produced at this time.

[fols. 9-10] Mr. Fitzpatrick: For the record, we will concede that the business is one affecting commerce and the labor relations of that business affects commerce.

. . . . . .

[fol. 11] Mr. Rotolo: We will produce other evidence as to the language of the unit and if there is any difference, you can see it yourself, Mr. Examiner.

Trial Examiner Leff: Very well.

Testimony of Abraham H. Saul.

Direct examination.

By Mr. Rotolo:

Q. Mr. Saul, what is your position with Local 3127?

A. I am the attorney and the business manager at the present time for 3127.

Q. Are you a member of the Bar of the State of New York?

A. Yes.

Q. How long have you been a member of the Bar?

A. A little over 14 years.

Q. Where is your office?

A. With the union at 130 West 42nd Street. That is in the Borough of Manhattan, City of New York.

Q. Were you in 1948 acting as attorney and business manager for this Local?

A. In 1948 I was the attorney but I was not the business manager. I was one of the business representatives.

Q. For 3127?

A. Yes.

Q. And will you tell us briefly what your duties were as a business representative in 1948 and what your duties are now as a business manager?

A. Well, actually the distinction between my duties then and my duties now is a small one. My present duties entail more responsibility simply because an associate of mine is no longer with the union. My duties at that time entailed the organization of shops, the negotiating of contracts, the filing of petitions or charges, whichever were appropriate, with the appropriate State or Federal agency and the arbitration of disputes—all of the thousand and one details that a labor representative or an attorney representing labor organizations is confronted with daily. I had authority to negotiate agreements subject to approval by the shop and subject to approval by my Executive Board.

[fol. 12] Q. And you were also the legal representative of the labor organization?

A. Yes, I was. I am not the general counsel for them. I am a legal representative for them.

Q. When you use legal representative, do you mean representative in matters of the Local——

A. I represented the Local in all legal matters except those that entailed going into civil courts. They had another attorney representing them there.

Q. You had a stipulation entered into here by the counsel for Respondents and General Counsel that there was a certification of Local 3127 as the collective bargaining agent of the employees of these two companies sometime in 1948?

A. That is right. That was about July of 1948, either in July or in the early part of August. I believe it was the latter part of July, though.

Q. After this certification, did your organization, 3127, engage in collective bargaining negotiations with representatives of these two corporations?

A. Yes, we did. We engaged in collective bargaining negotiations at the New York State Board of Mediation with an attorney named Ward and the Director of the Company, personnel director, who was named Meltzer. The agreement arrived at was repudiated by Mario Maccaferri.

Mr. Fitzpatrick: I object.

Trial Examiner Leff: Objection sustained to that portion of the answer beginning with the words "the agreement"—that is stricken.

Listen to the questions carefully and answer the questions responsively.

The Witness: All right.

By Mr. Rotolo:

Q. Just answer the question. You had collective bargaining negotiations?

A. Yes.

[fol. 13] Q. Did your organization sign an agreement with these two corporations as a result of these conferences sometime in December of 1948?

A. They were signed as a result of additional conferences and they were signed, I believe—may I check my date, I have the original contract here. They were signed on December 1, 1948.

Mr. Rotolo: Mr. Examiner, I should like to have this document marked for identification. It is a copy of agreement, collective bargaining agreement dated December 1, 1948 between Local 3127 and Mastro Plastics Corporation and French-American Reeds Company. I should like to have it marked as General Counsel's Exhibit 2 for identification.

(Thereupon the document above referred to was marked as General Counsel's Exhibit 2 for identification.)

By Mr. Rotolo:

Q. Now, Mr. Saul, I show you this contract marked General Counsel's Exhibit 2 for identification, and I will ask you whether this is a copy of the contract that Local 3127 signed on December 1, 1948, with the Respondents in this case?

A. Yes, it is.

Q. It is.

A. Yes.

Mr. Rotolo: Have you any objection, Mr. Fitzpatrick?

Mr. Fitzpatrick: I have no objection.

Mr. Rotolo: I reserve the right to produce a duplicate as you require sometime during the course of the hearing.

Trial Examiner Leff: Very well. Have you offered it now?

Mr. Rotolo: Yes.

The Witness: That has an addendum there that was not negotiated at that time. The particular contract terminated the——

[fol. 14] By Mr. Rotolo:

Q. Suppose you explain that now before we offer it in evidence. Are you referring to the last page of this document offered?

A. There was a reopening of this agreement. I have the exact date here and an arbitration award was handed down by Martin A. Wersing. This was part of the original negotiations had at the New York State Mediation Board and it was incorporated into the December 1 agreement. This was part of the original negotiations had at the New York State Mediation Board and it was incorporated into the December 1 agreement. This is not the subsequent reopening.

Q. All right.

Mr. Rotolo: I offer it in evidence.

Trial Examiner Leff: Did Mr. Fitzpatrick see it?

Mr. Fitzpatrick: No objection.

Trial Examiner Leff: General Counsel's Exhibit 2 is admitted.

(Thereupon the document previously marked for identification as General Counsel's Exhibit 2 was received in evidence.)

Trial Examiner Leff: Proceed.

By Mr. Rotolo:

Q. Incidentally, Mr. Saul, as business representative of Local 3127 in 1948 were you acquainted with the contracts of this organization with other employers?

A. Yes, I was.

Q. Will you tell us briefly what the jurisdiction of this union was?

A. Well, we have virtually an unlimited jurisdiction. We are in any type of furniture, wood, novelty, displays fixtures—our jurisdiction is unlimited. The creed of the Carpenters International is that anything that even remotely comes from a tree belongs to the carpenters.

Trial Examiner Leff: Or anything that goes into anything that comes from a tree?

The Witness: That is right.

[fol. 15] By Mr. Rotolo:

Q. Did your organization admit to membership employees of companies such as the Mastro Plastics Corporation and the French-American Reeds Company?

A. They were never actually admitted to membership because this agreement was subject to ratification by the Executive Board.

Q. You haven't answered my question. Were they eligible to membership in that organization?

A. Yes, they were.

Q. Were they members of that organization?

A. They were members but their dues never were paid. Their initiation was never paid. They were members because of their applications.

Q. I assume you mean the rules of the union may not have been fully complied with?

A. Yes.

Q. Did you know there was an election before the State Labor Board?

A. Yes.

Q. And that the majority of the employees had voted for 3127?

A. Yes, they had.

Referring to another union, Local 22045, a Federal Labor Union, where is that union's place of business, Mr. Saul?

A. At the same address in the same offices.

Trial Examiner Leff: What is that 22045?

The Witness: 22045.

By Mr. Rotolo:

Q. Were you connected in any official capacity with that organization?

A. I was a representative for that organization.

Q. Business representative?

A. Yes.

Q. In 1948?

A. Yes.

Q. Will you tell us whether Local 22045 had any labor contracts negotiated by you or executed by the officers of that organization in this area?

A. Oh, certainly, 22045 has had agreements executed [fol. 16] by various officers as well as myself during the past 12 years.

Q. Contracts covering working hours and conditions, wages?

A. General labor-management agreements.

Q. Can you mention some of the companies?

A. Cole Steel Equipment, Bridge Metal, Jayem.

Q. All 22045 contracts?

A. Yes, all 22045.

Art Loid Metal, Superior Shower and a couple of others. I can't think of them offhand.

Q. In this same period from 1948 on, did you mention any contracts which Local 3127 had other than the one which has been offered in evidence?

A. 3127 at that time was under contract with Majestic Arts, the Thatford Cabinet Company, Continental Cabinet Company, with a company called Royal Art, I believe—I am just trying to remember which of these companies go back. I don't want to give you any we didn't have at that time.

Q. Have you got any contracts now?

Trial Examiner Leff: Is this so important?

Mr. Rotolo: It is on the question of labor organization.

Trial Examiner Leff: What was 22045 to do with it?

Mr. Rotolo: That was the contracting union. We will show that. They came in afterwards.

Trial Examiner Leff: I see.

Mr. Rotolo: There is something unusual about this which we will show you. We are coming to it, Mr. Examiner.

The Witness: Mr. Rotolo, may I say that 3127 won an election at this Board about a year ago. We still have that employer on the contract.

By Mr. Rotolo:

Q. What employer are you referring to?

A. You asked if we had other agreements. We have an election at this Board which we won.

[fol. 17] Q. Do you have any labor agreements existing now between Local 3127 and any employers within this jurisdiction in this area?

A. Walter P. Sauer & Sons. They are in Queens. There is Short Television in Brooklyn. Sonic-Datone, Sonic Porto Case, Hudson Phonograph, we have Standard Wood Products, TeleCabinet and at least 10 others.

Q. Were employes of these companies participating in the affairs of this organization for their mutual aid and protection and so forth?

A. Yes, they do.

Q. Was this contract ever put into effect, Mr. Saul? This contract that appears as General Counsel's Exhibit 2?

A. Yes, it was.

Q. How long did it remain in effect?

A. It remained in effect, actually, about—actually, it remained in effect less than two months because this contract was back dated. This contract was finally negotiated about the end of January and it was signed as of December 1 which was the time it was agreed to be retroactive to.

Q. All right.

A. Some question had occurred at that time about a welfare fund and we had advised Mr. Maccaferri that we couldn't fulfill that agreement because of the lack of a welfare fund in it. We advised him that I represented another labor union, 22045, that was a Federal Local, that was allowed to sign contracts that did not have a welfare fund provision and that all of the 3127 agreements contained a provision for a welfare fund to be paid for by the Employer.

Q. Had the issue of welfare fund been negotiated with Mr. Maccaferri on behalf of 3127?

A. Yes, the issue had originally been agreed on in the

gotiations with Ward and Meitzer, but Mr. Maccaferri thereafter had refused to sign the agreement that they had negotiated and consequently the new agreement, dated December 1, was finally arrived at.

Q. Without the welfare clause?

A. Without the welfare clause. If you are interested in the reason for the delay, I will be glad to give it to you. [fol. 18] In any event, we advised the Employer that 3127 could not execute and live up to an agreement without a welfare fund, but that 22045 could and that the 22045 dues were only $2.00 a month whereas the dues in 3127 were $3.00 a month and that in view of the fact that we had not been able to agree upon the welfare fund, we wanted the agreement transferred to 22045, saving the employees the dollar a month dues.

Q. Did the employees or a majority of them at that time transfer their affiliation to Local 22045, do you know?

A. Yes, they did. On March 7, 1949, a stipulation was entered into assigning the 3127 agreement to Local 22045 and that was signed by some 2, 4, 6, 8, 10—by about 50-odd people, I think about 55 people, which constituted a substantial majority of the employees at that time.

Q. Do you know how many employees the company had at that time?

A. At that particular time I think they were pretty slow. I think they ran about 85, 80 to 90 people.

Q: I will show you——

A. I have a copy of this.

Mr. Rotolo: I should like to have marked as General Counsel's Exhibit 3 for identification a certain document together with an attached list of names, being an agreement between Local 3127 and Mastro Plastics Corporation and French-American Reeds, Assigning collective bargaining contract between Local 3127 and Mastro Plastics and French-American Reeds to Local 22045, which agreement was executed by Local 3127 and by Mastro Plastics and French-American Reeds.

Trial Examiner Leff: Show it to Mr. Fitzpatrick.

By Mr. Rotolo:

Q. Is this a copy of the agreement you referred to as being executed March 7, 1949?

A. Yes, it is.

Mr. Rotolo: Mr. Fitzpatrick.

Mr. Fitzpatrick: Thank you.

[fol. 19] Mr. Saul, I notice that this agreement which has not yet been marked for identification——

Trial Examiner Leff: It has been marked General Counsel Exhibit 3 for identification.

(Thereupon the document above referred to was marked as General Counsel's Exhibit 3 for identification.)

Mr. Fitzpatrick: ——states in paragraph 2 under the "therefore clause" that the assignee agrees to assume and faithfully perform and discharge all the terms, conditions, covenants and obligation assumed or to be performed or to be *or to be* discharged by the assignor under the said contract with the said Employer. Do you see that clause?

The Witness: Yes, indeed.

Mr. Fitzpatrick: I don't observe any signature by the assignee.

The Witness: No, the assignee did not sign this. The assignee did not sign this particular agreement.

Mr. Fitzpatrick: Was it your view that your signature as an official of 3127 was enough to bind the assignee?

The Witness: No, because I didn't sign for 3127.

Mr. Fitzpatrick: Well, Mr. Rothenberg's signature?

The Witness: No. Unfortunately the Employer prepared the various agreements. I believe that he prepared it and he omitted putting it on and we never got around to adding it.

Mr. Fitzpatrick: I don't have any objection to this document.

Trial Examiner Leff: General Counsel's Exhibit 3 is admitted.

(Thereupon the document previously marked for identification as General Counsel's Exhibit 3 was received in evidence.)

[fol. 20] Trial Examiner Leff: The hearing will come to order.

By Mr. Rotolo:

Q. Mr. Saul, after this assignment which appears in General Counsel's Exhibit 3 was executed did the employees of the two companies involved operate under the conditions of employment specified in the original contract with 3127 until the termination of that contract?

A. Yes, they did.

Q. Was there a new contract negotiated wth Local 22045?

A. Yes.

Q. At a later date, upon the expiration of the first contract with 3127?

A. Yes, sir.

Mr. Rotolo: Mr. Examiner, I should like to have this document marked which is an agreement dated December 1, 1949 between Local 22045 and Mastro Plastics and French-American Reeds——

The Witness: I have the original here, Mr. Rotolo.

Mr. Rotolo: That contract expired on November 30, 1950, I believe. Is that correct, Mr. Fitzpatrick?

Mr. Fitzpatrick: Yes.

The Witness: Yes, sir.

Mr. Rotolo: I would like to have that marked General Counsel's Exhibit 4.

Mr. Fitzpatrick: No objection.

Trial Examiner Leff: It may be marked.

(Thereupon the document above referred to was marked as General Counsel's Exhibit No. 4 for identification.)

By Mr. Rotolo:

Q. Mr. Saul, was this contract actually signed on December 1, 1949?

A. No, sir. It was signed sometime in March, 1950.

[fol. 21] Q. Will you explain why?

A. Paragraph 23(b) refers to an arbitration award that was made on February 1, 1950, which was after the signature date. What happened there, we couldn't get together on the terms of the increase. It was referred to arbitration. Thereafter, there was some dissatisfaction with the arbitrator's report. Only a portion of it was incorporated

into the agreement. The agreement was subsequently prepared by the company and handed to us for signature sometime in March 1950 but back dated to that date because the arbitrator's report required that certain increases be retroactive to that date.

Mr. Rotolo: I offer it in evidence.

Trial Examiner Leff: General Counsel's Exhibit 4 is admitted in evidence.

(Thereupon the document previously marked for identification as General Counsel's Exhibit 4 was received in evidence.)

Mr. Fitzpatrick: May I see it?

Trial Examiner Leff: Yes.

By Mr. Rotolo:

Q. Do you recall in the month of August, 1950, Mr. Saul, whether another labor organization, specifically, Local 23 of the Wholesale and Retail Employees Union——

A. 65.

Q. Local 65, began a campaign to organize the employees of these two companies?

A. They started some sort of drive. It was not an active campaign. They started it in August of 1950.

Q. Did you have any conversations with representatives of Local 65?

A. At that time.

Q. That attempted to organize these employees?

A. Not at that time, no.

Q. Sometime in September, 1950, did you have any conversations with Mr. Maccaferri, the president of these two companies involved here concerning a modification of the [fol. 22] existing contract or the negotiation of a new one?

A. Yes, I did.

Q. When?

A. On September 7——

Q. What are you referring to now?

A. I am referring to a diary maintained by me in 1950.

Q. Is that to refresh your recollection?

A. Yes, it is because I don't recall the dates otherwise. I remember the incidents but not the dates on which they happened.

Q. Is it necessary for you to refer to this book in order to refresh your recollection?

A. Yes, it is.

Q. Can you remember without the book?

A. No, sir.

Mr. Rotolo: Do you have any objection to the use of the book?

Mr. Fitzpatrick: No.

By Mr. Rotolo:

Q. By reference to your diary, do you recall whether you had any conversations or any meetings with Mr. Maccaferri concerning the contract?

A. Yes, sir.

Q. Tell us what the conversations were.

A. In the afternoon of September 7, 1950, I met with Mr. Maccaferri and the Committee.

Q. What Committee are you referring to?

A. The Shop Committee consisting of Peter Pieroni, Virginia O'Neill, Alma Swoboda, Rose Amoroso and a couple of others—I am not quite sure who else was there. Incidentally any meeting I ever had with Mr. Maccaferri was a meeting with the committee. I never met Mr. Maccaferri alone nor did any member of my organization.

Q. You are referring to the September 7 meeting?

A. Yes. On that particular day, Mr. Rotolo, I discussed a renewal or extension of the current agreement with a twelve and a half cent blanket increase for all employees. Mr. Maccaferri——

Q. Was the contract to be extended as it was in all other respects?

A. Yes, everything else the same with an extension for [fol. 23] a year until December of 1951. December 1 of 1951. Mr. Maccaferri stated that he would consider it and he would give us an answer.

Q. Did you have any meetings with him after that during the month of September about this matter of changing the contract?

A. I have a shop meeting——

Q. Did you have any conversations with Mr. Maccaferri either by telephone or otherwise concerning this demand for this proposal that was made on September 7, 1950?

A. I don't have a record of telephone calls, but I spoke to Maccaferri at least once or twice a week trying to press him for an answer. Finally, I had another meeting with him on September 15, which was the day after we had a shop meeting. We had the shop meeting in the afternoon of September 14, a Thursday. On Friday we met at the place, the Mastro office with the Committee to discuss the increase. Maccaferri refused to discuss the increase but started talking about the 65 drive. First he accused me of sending 65 around in order——

Mr. Fitzpatrick: I ask that the accused be stricken.

Trial Examiner Leff: Yes. Just let us know what he said.

By Mr. Rotolo:

Q. Tell us what he said.

A. All right. First he said to me "You people think you are smart. You sent 65 around here. You thought you would get some more money for these people out of me."

I impressed him with the fact that we had no interest in any labor organization other than our own and I certainly had no interest in Local 65.

Mr. Fitzpatrick: May I ask when you say "our own" to which organization you refer?

The Witness: The Local that we were discussing in representing at the particular moment, 22045.

[fol 24] Mr. Fitzpatrick: May I again ask: You previously stated that you had never met Mr. Maccaferri alone and no other representative of your organization had ever met Mr. Maccaferri alone. When you used the term "organization" there, did you mean 3127 or 22045 or both?

The Witness: I think——

Mr. Rotolo: I don't think he quoted the testimony correctly. I don't think he said any other representative.

The Witness: Yes, I did.

Mr. Rotolo: Did you say that?

The Witness: Yes, I did. What I meant, Mr. Fitzpatrick, was that no man connected with my office had ever met Mr. Maccaferri alone and we represent five labor unions.

By Mr. Rotolo:

Q. Mr. Saul, do you recall at that time in September, 1950, there were charges filed against the companies involved here by four employees of the company alleging that they had been discharged for activities, do you know about that?

A. I don't remember if it was filed then.

Mr. Fitzpatrick: I object on the question that the previous question remains unanswered.

Mr. Rotolo: I am sorry.

Mr. Fitzpatrick: He was telling of a conversation had on September 15 with Mr. Maccaferri.

By Mr. Rotolo:

Q. All right.

A. Maccaferri said he didn't want 65 in there. I asked him how he thought we felt. He suggested that we work together. I asked him what he had to contribute and he brought some fellow in who was a publicity man and he said to us that this fellow was going to check up the background of 65 and would prepare a report on 65 at con- [fol. 25] siderable expense to Mr. Maccaferri. And that he wanted the union to pay that expense.

Mr. Fitzpatrick: Just a moment.

Trial Examiner Leff: You will have an opportunity to cross examine.

Mr. Fitzpatrick: I just want to make it clear now as to whether he was confining the statement he made to this meeting.

The Witness: Yes.

Mr. Fitzpatrick: When you say he brought in a publicity man, you mean he had a publicity man physically present at the meeting of September 15.

The Witness: He was in the outer office and he brought him into that room.

Mr. Fitzpatrick: All right.

By Mr. Rotolo:

Q. Was there any discussion had about the proposal that your union had made on September 7 of the twelve and a half cent increase?

A. He wouldn't discuss it. He said when we settle the 65 thing there is plenty of time to talk about raises. As a matter of fact I recall him saying "I am not going to give you one and then go out of business because I will go out of business if 65 comes in."

Q. Was the name of any other labor organization brought up at this meeting?

A. No, there wasn't, not at that time.

Q. Did you have any other conversations with Mr. Maccaferri during the month of September?

A. I had another meeting with Mr. Maccaferri on September 20th. At that time I was pressing him for an answer on this twelve and a half cent raise. He started to tell me about the company's financial problems and I told him I was not interested in them any longer because I had been living with them for two years and that I found out that [fol. 26] the company had made plenty of money. He said to me "Well," he says, "I am not going to sign a contract with you unless Joe Tonelli okays it."

Q. Do you know who Joe Tonelli is?

A. I asked him.

Q. Did you know at that time?

A. No, I had never heard the name in my life. I said who is Joe Tonelli? He says he is a friend of mine. They have got the union at Banner Plastics.

Q. Did he mention the name of the union?

A. No. I says what are you trying to do, bring another union in here? He says no, no, no. I said whom am I to discuss your contract with another labor union. He said Tonelli is a friend of mine. He is all right with them at Banner and Banner is a stockholder of my company and I had a talk with Tonelli and he is all right. If he tells me to sign it, I will sign it, otherwise I am not going to do anything. You can do anything you want.

I says where is Mr. Tonelli? He took out a card and he says to me "Here he is, he is with the paper Box Union Local 318 and he is vice-president of the International."

I said that doesn't mean anything to me. Where are they located?

So he told me they were down at 225 Lafayette Street. I took the number and I went back to my office.

Q. Coming back to the question I asked you before, did you know that at that time the company had discharged some employees and that a charge had been filed by Local 65 alleging that they had been discharged for union activities?

A. I don't recall if it was then or about a week later that I discussed it with them.

Let me see if my notes would show it.

Mr. Rotolo: Would you stipulate, Mr. Fitzpatrick?

Mr. Fitzpatrick: I will stipulate that a charge was filed by 65.

Mr. Rotolo: The date.

Mr. Fitzpatrick: I don't have the date.

[fol. 27] The Witness: They were discharged after that, I am sure.

Mr. Rotolo: All right.

By Mr. Rotolo:

Q. The records show, our files, that the charge was filed by Local 65 on September 29, 1950, alleging the discharge on September 26, 1950——

A. That is right.

Q. Of Anthony Purri and Irene Purri and two other employees Vincent Strio and Herman Figuroa.

A. I talked to Maccaferri about those people on the 29th of September, not at this time.

Q. All right. Then did you have conversations before the 29th then about the contract or about this Tonelli incident?

A. I talked to the people in the office. I told them what had happened and as a result of that conversation, I called Tonelli. I made an appointment with him for the following Saturday.

Q. What date was that?

A. 23rd.

Q. Does your diary show it?

A. Yes. I met Tonelli on the 23rd of September at ten o'clock in the morning.

Q. Tell us the result of your conversations with Mr. Tonelli.

A. Well——

Mr. Fitzpatrick: I object to the form of the question.

The Witness: As a result of the conversation——

Trial Examiner Leff: You don't want the witness to get into the conversation but you want to know what the witness did as a result of the conversation?

Mr. Fitzpatrick: I will object to the form.

Trial Examiner Leff: Overruled.

The Witness: As a result of that conversation, I know that I called Maccaferri and told him that I didn't like Tonelli and I didn't like his idea of his sending me there. I remember that the conversation was a rather angry one and I hung up on him. Then I got a call from Kahn, David [fol. 28] Kahn, who was Maccaferri's attorney and who reminded me of the several years that I had been able to live together in harmony with Maccaferri and cautioned patience. There were several other calls up and back and I paid no attention to Tonelli at all. Then on September 29, I called—I got a call from the Board.

Trial Examiner Leff: What Board?

The Witness: The National Board, the NLRB in the morning about some case down here being adjourned and I found out at that time that the Purris had been discharged. They were husband and wife. I went up to see Maccaferri that afternoon with the Committee and I suggested that he reinstate them or since he stated that he would never take them back, that he give them some sort of severance pay.

By Mr. Rotolo:

Q. Before you go on, in order to make the record clear, our files show that on September 28, 1950, Local 65 filed a petition in Case 2-RC-2796 claiming the majority of employees of these two companies in the unit of production workers had made a request for bargaining on September 27, 1950.

Is there any question about that, Mr. Fitzpatrick? I believe that was one of the original petitions which was consolidated.

Mr. Fitzpatrick: You say the petition was on—was filed on September 25?

Mr. Rotolo: September 28.

Mr. Fitzpatrick: I am sorry.

Mr. Rotolo: That is Case 2-RC-2796.

The C case which was filed by Local 65 on the discharge of the four employees is Case No. 2-CA-16—no, I am sorry, 2-CA-1610. 2-CA-1610 was withdrawn on November 29, 1950 by Local 65.

[fol. 29] By Mr. Rotolo:

Q. All right, Mr. Saul. You made some reference to a call from the Labor Board that a meeting was postponed.

A. If Arthur Goldberg handled this case, then it was this case. If not, it was another case. "Goldberg, L. M. election", Labor Management election.

Q. I believe that was a conference on the petition filed by 65, Mr. Examiner.

Trial Examiner Leff: Who is Goldberg?

Mr. Rotolo: Our Field Examiner.

By Mr. Rotolo:

Q. All right.

A. I then saw Maccaferri again on Monday which was October 2.

Q. Did you finish telling us about the conversation with Mr. Maccaferri about the discharge of employees?

A. He wouldn't take them back. I told him he was giving 65 ammunition. He said the hell with 65, his publicity man had a big booklet and if I am not mistaken he gave me the booklet that day and I took it back with me and studied it.

Q. What was the booklet about?

A. It was a very rambling, stupid chronology.

Q. Leave out your characterization.

A. It was a rambling chronology of the background of 65. It had nothing in it which was factual in any nature. It contained a list of attacks by certain newspaper columnists whose views I never shared. The following Monday——

Q. What date are you talking about now?

Mr. Fitzpatrick: Will the witness complete the answers to the question, what it was about?

Mr. Rotolo: The booklet?

Mr. Fitzpatrick: He said it was stupid.

The Witness: It was a chronology about 65. I think it

contained a couple of Westbrook Pegler articles and it contained notations by reporters which had not been published [fol. 30] on the origins and backgrounds of 65. They were primarily surmises and nothing factual, as I recall it, was contained that would give us any ammunition that might be used in an article for distribution to the workers.

By Mr. Rotolo:

Q. Ammunition of what sort?

A. For example——

Q. As to their position on wages?

A. As to the type of organization that 65 was, Mr. Rotolo. Later on, we distributed certain circulars about 65——

Q. Don't go into anything unless I ask you a question about it, please.

A. Oh, I am sorry.

Trial Examiner Leff: I think we will move along at a much faster pace if you will just listen to Mr. Rotolo's questions and answer them directly.

By Mr. Rotolo:

Q. Did you have any conversation with Mr. Maccaferri about the reinstatement of these four employees at any other time?

A. On October 2.

Q. Yes.

A. And he refused to reinstate them.

Q. Is that the entire conversation you had with him at that time?

A. I told him I would try to get a hold of the people and I would take the matter to arbitration, the people never showed up at the office and I don't believe we ever arbitrated.

Q. Did Mr. Maccaferri agree to arbitrate on the discharge of these employees?

A. No, but we had an arbitration procedure.

Q. I understand——

A. No, he absolutely refused to arbitrate. I asked him but he refused.

Q. Did he give any reason?

A. He just wouldn't have them. He said they were no goods. Every time I talked to him about them or about 65,

all I heard was that he was going to close up. He had run away from Italy to get away from Fascists and he had run [fol. 31] away from France to get away from Communists and he wasn't going to go with Communists here. You couldn't mention 65 to him here. He wasn't going to go with Communists. He wasn't going to have any truck with them.

Mr. Fitzpatrick: I move that the conversation of October 2 in its entirety be stricken. It doesn't appear to be relevant to any issue before the Board.

Trial Examiner Leff: It is hard for me to tell at this stage. Do you think it is relevant?

Mr. Rotolo: If you leave it in, you will see the relevancy of it. Subject to being stricken, I think you should reserve your ruling on the admissibility or relevancy of this evidence until the rest of the background is introduced through this witness.

Trial Examiner Leff: The motion is denied.

Mr. Fitzpatrick: I should rather have the Examiner say that the matter is received subject to connection.

Trial Examiner Leff: You may make a motion later on to strike it if it appears to be irrelevant. It is hard for me to tell at this early stage what is significant and what is not.

Mr. Fitzpatrick: Very well.

May I be informed by counsel for the General Counsel whether the incident of October 2 is relied upon as one of his so-called prior breaches of the agreement.

Mr. Rotolo: No, it is background, Mr. Examiner. It is submitted for background purposes.

Trial Examiner Leff: Is this a convenient place for you to suspend?

Mr. Rotolo: I could suspend here if you want to, Mr. Examiner. I am not through with this witness. I have another half hour.

Trial Examiner Leff: I understand.

[fol. 32] We will recess until 10:00 a. m. tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., Monday, March 3, 1952, the hearing in the above-entitled matter was adjourned to Tuesday, March 4, 1952, at 10:00 o'clock a. m.)

PROCEEDINGS—March 4th, 1952

Trial Examiner Leff: The hearing will come to order.

ABRAHAM H. SAUL, a witness called by and on behalf of the General Counsel, resumed the stand and testified further as follows:

Direct examination.

By Mr. Rotolo (Continued):

Q. Mr. Saul, at the conclusion of yesterday's session I think you had testified that you had a meeting with Mr. Maccaferri on October 2. Is that correct?

A. That is right.

Q. Prior to that meeting, had you prepared a notice to the company to modify the contract that your organization had with these companies respondent?

A. No. We had actually prepared it afterwards, but we dated it September 29.

Q. Why was that?

A. Well, we didn't anticipate that we would have any difficulty with renewal, and we didn't give the 60-day strike notice. When Maccaferri started hemming and hawing and stalling, I prepared the notice and I delivered it by hand.

Q. When was it actually prepared?

A. I think that was when I saw him again, I think, on or about the tenth of October.

Mr. Rotolo: I would like to have this letter marked General Counsel's Exhibit 5 for identification.

[fol. 33] (The document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

Mr. Rotolo: General Counsel's Exhibit No. 5 for identification is a letter addressed to Mastro Plastics Corporation on the stationery of Local Union 22045, signed by S. Rothenberg.

By Mr. Rotolo:

Q. I show you this letter, General Counsel's Exhibit No. 5 for identification, and ask you whether that was the letter you prepared sometime around October 10, as you testified.

A. That is an exact copy of it.

Q. And who is Mr. S. Rothenberg who signed this letter? Who was he at that time?

A. The secretary and business agent of 22045.

Mr. Rotolo: I offer it in evidence.

Trial Examiner Leff: Any objection?

Mr. Fitzpatrick: May I see it for a moment?

Trial Examiner Leff: Yes.

Mr. Fitzpatrick: No objection.

Trial Examiner Leff: It is admitted.

(The document previously marked General Counsel's Exhibit No. 5 for identification is received in evidence.)

By Mr. Rotolo:

Q. Mr. Saul, did you receive any notice in the early part of October, 1950 that Local 318 organizers were distributing cards in front of the plant of Mastro?

Trial Examiner Leff: Will you read that question, please?

(Pending question read.)

The Witness: Yes, sir.

[fol. 34] By Mr. Rotolo:

Q. How did you receive that knowledge?

A. I got some telephone calls from people in the shop on October 6 telling me that there were some 318 representatives giving out circulars outside of the shop. As a matter of fact, one of them, I brought down one of the circulars. Do you care to see it?

Q. Do you have that circular?

A. Yes.

Q. Produce it, please.

A. I believe that is the circular.

(Witness hands document to Mr. Rotolo.)

Q. You say you recall this was the circular brought to you in the early part of October?

A. Yes, sir.

Mr. Rotolo: Please have this marked as General Counsel's Exhibit 6 for identification.

(The document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

The Witness: May I see it again, please?

Yes, that is the one.

Mr. Rotolo: I offer it in evidence.

Mr. Fitzpatrick: I have no objection.

Trial Examiner Leff: General Counsel's Exhibit 6 is admitted.

(The document previously marked General Counsel's Exhibit No. 6 for identification is received in evidence.)

By Mr. Rotolo:

Q. Did you have a conversation with Mr. Maccaferri about that time, the time you received this circular, Mr. Saul?

A. I got this circular Friday night. I think that was the sixth, if I am not mistaken.

Yes. I tried to call Tonelli and he wasn't in. I finally got Tonelli about 6:30 Monday night. I had a conversation with him on the telephone, resulting in an appointment for a couple of days later, I think it was for Wednesday.

[fol. 35] The next day I called Maccaferri and I went up to see him.

Trial Examiner Leff: And what was that date?

The Witness: Tuesday, the tenth of October I called Maccaferri. I went up to see him. That is the day I gave him the other letter and I asked him, "What about this thing?"

By Mr. Rotolo:

Q. Is that the letter marked General Counsel's Exhibit 5?

A. Yes, the 60-day notice. I asked him, "What about this thing?"

Well, he said to me he couldn't handle 65, but that 318 could, and it was all A. F. of L.; what did I care?

I said, "I don't give a damn about the paper box union, I am interested in my union."

There were words up and back, and I said to him, "How come they are talking about an election? Have you agreed to give them an election?"

He said, "I don't know what they are doing."

I said, "When did they get cards signed?"

He said, "Why don't you take it up with Tonelli?"

I said, "I will, and I will get them out of here."

Well, the following day I went to see Tonelli and I had a talk with him. Then I had an appointment with Kahn.

Mr. Fitzpatrick: Is that the eleventh?

The Witness: The eleventh is when I saw Tonelli.

By Mr. Rotolo:

Q. Did you go back and talk to Mr. Maccaferri after you saw Tonelli?

A. I didn't go back to the plant, but I talked to Tonelli in Mr. Kahn's office on the twelfth.

Q. The attorney is Kahn?

A. Yes, 120 Broadway.

Q. You had a conversation with Maccaferri?

A. No. Maccaferri wasn't there. I just talked to Kahn.

Trial Examiner Leff: Who is Kahn?

[fol. 36] The Witness: Maccaferri's attorney.

Trial Examiner Leff: What is his full name?

The Witness: David W. Kahn, 120 Broadway. He is the general attorney for Maccaferri all through the years that we have known him.

By Mr. Rotolo:

Q. How did you know of this appointment that you had at Kahn's office? Who notified you?

A. I don't recall if Maccaferri called me to get in touch with Kahn, or asked me to, or if I called Kahn. Kahn was a court of last resort. He was the fellow you went to to straighten things out whenever you couldn't get along with Maccaferri.

I had an appointment with him and I told him what happened.

He told me not to worry about anything, "I will straighten it out."

Q. Who else was at that conference?

A. I think only Kahn and I were there.

Q. Are you sure Mr. Maccaferri wasn't at that meeting?

A. I am positive he wasn't there.

Q. Did you have any subsequent conversations with Mr. Maccaferri after that meeting in Kahn's office?

A. No. It seems to me that after that meeting and the meeting I had with Tonelli, there was a cessation of activity on the part of 318; at least, a cessation of overt activity, and we continued with our anti-65 drive and the handbills we circulated. I believe we circulated a series of three or four handbills, which were offsets of certain of Victor Reisel's articles. He is a columnist in the "New York Mirror". I have the last of those here if you care to see it. That was distributed the day after it was printed.

Q. Was that propaganda literature your union circulated?

A. Yes.

Q. To combat Local 65 campaigns?

A. Yes, sir. That was distributed on October 18, and this [fol. 37] particular article was printed in the "New York Daily Mirror" on October 17, 1950.

Q. Did you intervene in the "R" proceedings with 65 at the Labor Board?

A. Yes.

Q. You submitted your contract——

A. Yes.

Q. —as proof of interest?

A. Yes, sir.

Q. You know whether Local 318 intervened in that "R" proceeding?

A. I think they intervened subsequently.

Mr. Fitzpatrick: I will object to that on the ground it is not the best evidence. The record in that case is the best evidence.

Trial Examiner Leff: We may save time, Mr. Rotolo, if you read what the Board's records reveal on the subject, and ask Mr. Fitzpatrick to stipulate it. Let's have the chronology of the important dates in the representation proceeding.

Mr. Rotolo: Our records show, Mr. Examiner, that on October 24, 1950, Local 318 intervened in the Local 65 petition.

Trial Examiner Leff: When was the petition filed?

Mr. Rotolo: The petition was filed on September 28 in 2-RC-2796.

Our records also show that Local 318 at that time submitted 73 membership cards as proof of interest.

Trial Examiner Leff: What Local was that?

Mr. Rotolo: Local 318 submitted 73——

Trial Examiner Leff: I thought the petition was filed by 65?

Mr. Rotolo: That is right. Local 318 intervened.

Trial Examiner Leff: When did they intervene?

Mr. Rotolo: On October 24, submitting 73 membership cards as proof of their interest in the proceeding.

[fol. 38] Trial Examiner Leff: Seventy-three?

Mr. Rotolo: That is right.

Mr. Fitzpatrick: What date?

Mr. Rotolo: October 24.

A check of the payroll records at that time showed that 58 employees on the payroll were included in the cards submitted, 57 dated October 1, and one in September.

Trial Examiner Leff: When did Local 22045 intervene?

Mr. Rotolo: That is what I am looking for, Mr. Examiner.

The Witness: I don't think we ever filed a formal notice of intervention. I think we were named and we just appeared at the conference that was called, Mr. Rotolo.

Mr. Rotolo: I am looking for the file to fix the date of an appearance in the case.

I think our Field Examiner notified the contracting union on the basis of the petition—it was not mentioned in the contract. Our records show the company contacted the Examiner and advised him there was a contract with the Federal Labor Union, 22045, covering the unit; that it would send a copy of the contract.

There seems to be no record as to the time when 22045 intervened in the case, but at a subsequent time, Mr. Examiner, on October 17, Mr. Goldberg sent a form letter to all the parties involved including 22045 for a conference at the Board's offices on October 24. It might be that at the time that the——

Trial Examiner Leff: First, will you stipulate, Mr. Fitzpatrick, that the records of the Regional Office here show what Mr. Rotolo has just stated they show with reference

to the date of the filing of the petition by Local 65, the date [fol. 39] when Local 318 intervened in the proceedings, and the facts relating to the submission of authorization cards by Local 318?

Mr. Fitzpatrick: First I would like to ask Mr. Rotolo what form the intervention took. Was there a formal paper filed?

Mr. Rotolo: I don't believe so.

Trial Examiner Leff: Intervention by Local 318.

Mr. Fitzpatrick: By Local 318, yes.

Mr. Rotolo: Intervention of 318? I don't believe there was any formal intervention. It was just a submission of cards, membership cards, as claim of an interest in the proceeding. I believe that a letter accompanied those cards.

The Witness: 317 submitted a petition for an election. That is my memory. They submitted a petition.

Trial Examiner Leff: Why don't you just answer questions, Mr. Witness? You will make the record very confusing.

Mr. Rotolo: Local 65 filed a petition, and 318 intervened.

Mr. Fitzpatrick: 318 submitted cards.

Mr. Rotolo: Yes, with a letter. I think the letter is somewhere here. We have a letter from our agent here, a letter dated October 13, 1950, acknowledging receipt from Local 318 of 72 cards to support its claim of interest.

Upon further examination, I don't believe there is any formal letter. Apparently the cards were brought personally to the office by the Agents of 318 and made an oral intervention in the proceeding, Mr. Examiner.

Trial Examiner Leff: Mr. Rotolo's thought processes which are going on the record may be very valuable to the court reporter, but they don't serve any function here. Let's [fol. 40] go off the record and determine what we are going to stipulate on and then just enter a stipulation on the record.

Off the record.

(Discussion off the record.)

Trial Examiner Leff: On the record.

Are you ready with the stipulation?

Mr. Rotolo: Yes.

Mr. Fitzpatrick: Suppose I put it in?

Mr. Rotolo: All right.

Mr. Fitzpatrick: The record of the Board in Case No. 2-RC-2796 shows that on October 24, 1950 Local 318 submitted 73 cards in proof of interest in that proceeding.

The record further shows that on October 31, Federal Labor Union 22045 appeared in that proceeding by Mr. Saul and objected to a consent election.

Mr. Rotolo: I should like to add to that stipulation, Mr. Examiner, that on October 31 a joint conference was held by the Field Examiner Arthur Goldberg in charge of these proceedings, and at that meeting representatives of Local 65 and the Federal Labor Union 22045, and representatives of Local 318 appeared and the question of consent election was disgussed at that time.

The memo of the Field Examiner indicates that all parties were in agreement on a consent election with the exception of Local 22045, which refused to do so for the reason that it alleged the company had assisted Local 318 in organizing the employees, and that it would file appropriate charges against the company on that day.

Trial Examiner Leff: Do you accept that?

Mr. Fitzpatrick: I so stipulate.

Trial Examiner Leff: Thank you.

Mr. Fitzpatrick: I stipulate that the records show that. [fol. 41] Trial Examiner Leff: Yes. You don't concede it to be a fact.

Mr. Fitzpatrick: Not necessarily, no.

Mr. Rotolo: There is one other matter that I think should go with that stipulation, Mr. Examiner: That on November 2, 1950 Local 22045 filed charges against the company alleging assistance to Local 318, and that that case number is 2-CA-5656.

Trial Examiner Leff: Is that the present case?

Mr. Rotolo: No. Those charges were subsequently withdrawn, Mr. Examiner, by Local 22045 at the time it filed a petition of its own, a RC petition of its own, which is number 2-RC-3170. That petition was filed on December 12, 1950.

To complete the picture of this "R" proceeding so that we can have the whole thing at once, the record shows that

on December 13, 1950, Local 318 advised this office of its withdrawal of interest in the proceedings of Local 65. At that time——

Trial Examiner Leff: What is that date?

Mr. Rotolo: December 13.

Trial Examiner Leff: '51?

Mr. Rotolo: '50.

When Local 3127 filed its own petition on the previous day, December 12, 1950, it submitted 60 membership cards in support of the petition.

On December 26, 1950, Local 65 advised this office of its withdrawal of interest and its desire not to proceed with its petition.

On December 29, 1950, a combined hearing was held on the two "R" cases; that is, the petition of Local 65, which is 2-RC-2796, and the petition of 3127, which is 2-RC-3170.

At that hearing Local 65 representatives and Local 318 representatives appeared and withdrew any claim they had to represent employees of these companies.

[fol. 42] Trial Examiner Leff: Local 318?

Mr. Rotolo: Yes.

Local 65 and 318 appeared and withdrew their claim of representation. Thereupon, the hearing proceeded on Case No. 2-RC-3170, which was the petition of 3127, the other petition being withdrawn by Local 65.

On January 29, 1951, the Board issued an order in that proceeding ordering an election, and by subsequent order it held up the election pending disposition of the charges in the instant case, which had been filed by 3127 on January 26, 1951.

As I understand, the previous charges filed by 3127 had been withdrawn to enable it to proceed with its petition at the hearing.

Trial Examiner Leff: Before you get into your understanding, do you stipulate to what Mr. Rotolo said?

Mr. Fitzpatrick: I will, yes.

I would like, off the record, to see a copy of the charges filed by 318. I don't have a copy of those.

Mr. Rotolo: By 318?

Mr. Fitzpatrick: No; 3127, which were subsequently withdrawn.

Mr. Rotolo: Yes.

Mr. Fitzpatrick: If I can see your records, please.

Mr. Rotolo: Do you want to see it now?

Mr. Fitzpatrick: Yes.

Trial Examiner Leff: Off the record.

(Discussion off the record.)

Trial Examiner Leff: On the record.

The stipulation is approved.

By Mr. Rotolo:

Q. Mr. Saul, you heard during the discussion on the "R" proceedings that your union, 22045, filed charges against [fol. 43] the company sometime in November 2, 1950 alleging that the company had been assisting Local 318 in organizing employees.

The record also shows that those charges were withdrawn.

Can you explain why they were withdrawn?

The Witness: Well, up to October 23, we had only been dealing on behalf of 22045. On October 23 we held a membership meeting wherein certain demands were formulated and a new shop committee selected. It was an enlarged shop committee consisting of 14 people.

Thereafter, we arranged a tentative meeting for the following week, no date was set.

In the course of that meeting, and among the demands that were formulated, was a demand for welfare fund. We explained again to the people that it would be impossible for 22045 to secure a welfare fund because they did not have the machinery to handle it, and that getting a welfare fund might necessitate a transfer to 3127. There was no actual action taken that night, but the following Monday, as a result of certain telephone calls that we got from our people in the shop advising us of the distribution in the plant by certain foremen and workers of 318 of application cards, and an emergency meeting was held that same afternoon at 4:30 when the people left the plant. We channeled them all in the Bedford Park Restaurant. We had a meeting at which a renunciation of membership in 318 was signed.

Mr. Fitzpatrick: On what date is this?

The Witness: I believe there was a revocation at the October 20 meeting. There was a revocation of authority to Local 65 executed. At that time we had been unaware of the——

Mr. Fitzpatrick: I move to strike the answer. It is not responsive.

[fol. 44] Trial Examiner Leff: I think perhaps you better lead the witness. By that I don't mean asking leading questions, but direct the course of his testimony. This way it rambles and I lose track of what is occurring.

I will strike the answer.

Mr. Rotolo: Let's start over again.

Trial Examiner Leff: Let's go into it by slow stages.

Just as a matter of being helpful to the Examiner, try to make your answers as concise as possible, and try to direct your answer responsively to the question, and don't volunteer because you go into matters that are ahead of Mr. Rotolo, and the Examiner might lose sight of what is being developed here.

By Mr. Rotolo:

Q. I asked you before, Mr. Saul, why 22045 withdrew its charges which it filed against the company in November. Was it because of any subsequent claim of interest by 3127, petition filed by 3127?

A. Yes, it was.

Q. Now, you testified that you had one meeting with Mr. Kahn, the company attorney, sometime in the middle or the early part of October. Did you have any other meetings with Mr. Kahn during that month at which other persons were present?

A. Yes.

Q. When was that?

A. About a week or so later. But that was the meeting at which Mr. Maccaferri was present.

Q. Who else was present?

A. A lawyer named Shipman. There were one or two other men there. I don't remember who they were. I think somebody else from Shipman's office.

Q. Was Local 318 representative present at that time?

A. No.

Q. What was the subject of that conference?

A. They asked me——

[fol. 45] Trial Examiner Leff: Who is "they"?

The Witness: Everybody participated in the conversation. I think Shipman asked me if I would be interested——

Trial Examiner Leff: Was Shipman a representative of the company?

The Witness: He was an attorney representing Maccaferri as a labor relations man.

Trial Examiner Leff. All right.

The Witness: Shipman, I think it was, asked me if I would be interested in withdrawing from the plant and allowing Tonelli to take over.

By Mr. Rotolo:

Q. You mean Local 318?

A. Yes.

I said, "No."

Maccaferri asked me what my objection was.

I told him that my union derived its living from the dues, and that we had no intention of letting 318 or anybody else take over any of our plants.

He said to me, "I understand that 318 wants to compensate you for withdrawing."

I asked him if it was 318 or he who wanted to compensate me.

He said, "No, no, 318. I understand they want to buy the shop."

I told him that if they wanted to buy the shop he had no business knowing about it, and that the fact that he was so familiar with their plans didn't stand so well with me.

Kahn interjected and he said to me, "It is all in the American Federation of Labor."

So I gave him some sort of an answer that all lawyers are members of the bar, too, but each one tries to get his own clients.

Then I wanted an assurance from them that they would have no interference from 318 in the future. I think it was

[fol. 46] Shipman who said to me, "All right, we will see to it that they stay away from the place."

Q. At that time Local 22045 still had the contract with the company; is that right?

A. Yes, it did.

Q. Now, we come to membership meeting that you referred to on Friday, October 20.

Where was that meeting held?

A. That meeting was held at the Bedford Park Restaurant.

Q. How many members were present at that meeting; do you recall approximately?

A. I would say around 90 people; maybe more.

Q. Now, at that meeting, do you recall whether there was any vote taken cancelling, by which the members cancelled any membership cards they had signed with Local 65 or any other labor organization?

A. Yes, sir.

Q. Do your records refresh your recollection on that?

A. Yes, sir. I think somewhere I have a copy of what they signed. They signed a revocation of authority to Local 65.

Q. I am only interested in the fact whether that vote was taken at that meeting.

A. Yes, it was taken and executed that day.

Q. Was any other matter taken up at that meeting after that revocation?

A. Yes, sir.

Q. What matters?

A. The next order of business was selection of a committee, and a committee was selected from each department. Then a discussion was had of the demands.

Q. New demands?

A. Yes, sir, to be presented to the employer.

Q. This was still by Local 22045?

A. Yes, sir.

Q. All right.

A. Do you want a list of the demands?

Q. Yes, will you give us a summary of them?

A. There was a three per cent welfare fund.

The contract expiration date to be changed to September in the future.

A 25 cent increase to non-bonus employees, and a 12½ cent per hour increase to employees under the bonus plan. [fol. 47] Time and a half paid plus holiday pay for any work on paid holidays.

Change in the vacation clause to read as follows: "Six months, two days; one year, one week; 18 months, a week and three days; three years, two weeks.

Q. These demands were formulated on October 20?

A. Yes, sir.

Q. Were they pursuant to the notice which had been served on the company sometime in early October to modify the existing contract?

A. Yes.

Mr. Fitzpatrick: I object to the form of the question.

Trial Examiner Leff: Read the question.

(Lines 17 through 20, this page, read.)

Trial Examiner Leff: What is the basis of your objection?

Mr. Fitzpatrick: I object to calling upon the witness to state something done pursuant to something else. If Mr. Rotolo wants to establish factually that these were the only set of demands presented after the service of the notice of intent to modify——

Trial Examiner Leff: Objection sustained.

Mr. Fitzpatrick: I object to that.

By Mr. Rotolo:

Q. Mr. Saul, you recall you testified that sometime in October, early part of October, you served a letter which is in evidence, General Counsel's Exhibit 5, to modify the contract, existing contract, between the companies and Local 22045. You remember that?

A. Yes, sir.

Q. Now, will you state whether the list of new demands to be presented to the company voted on at the meeting of October 20 was in preparation for modification of the [fol. 48] contract in accordance with the notice you had given to the company?

A. Yes, it was.

Q. You recall the following Monday, October 23, 1950?

A. Yes, sir.

Q. Did you receive any notice from employees of the respondent companies as to union activities going on in the plant?

A. Yes, sir. I got quite a few calls from different workers advising that some of the foremen and some of our members, including our chair lady, was distributing 318 cards.

Q. Who is the chair lady?

A. Virginia O'Neil.

Mr. Fitzpatrick: I move to strike that, what he was told by unidentified persons which, itself, is secondary evidence.

By Mr. Rotolo:

Q. Do you recall the names——

Trial Examiner Leff: Just a moment. I want to hear from you on that, Mr. Rotolo.

Mr. Rotolo: I think it is admissible.

Trial Examiner Leff: Is that in the nature of a preliminary question?

Mr. Rotolo: Yes.

Trial Examiner Leff: I won't consider it as evidence. You didn't want me to consider it as evidence that there actually was distribution by foremen.

Mr. Rotolo: We will have independent evidence on that.

Trial Examiner Leff: I will receive it with that understanding.

The Witness: Yes, sir.

By Mr. Rotolo:

Q. What did you do as a result of these notices, or these calls?

A. I called the plant back and asked for Maccaferri, and he was not in.

[fol. 49] Q. Had you served the demands that had been prepared on Friday by Local 22045?

A. No, sir.

Then we went down to the plant.

Q. Did you have a meeting on that night?

A. Yes.

Q. Of the employees on October 23?

A. Yes.

Q. At the Bedford Park Restaurant?

A. In the late afternoon we had a meeting, and at that meeting a resolution was passed to switch to 3127 because of the welfare situation and because of the activity of 318. I explained to the membership that 3127 was a stronger local, had the backing of an international, that we had the welfare fund in existence since 1945.

Q. Was a vote taken at that meeting to transfer the affiliation of the members to Local 3127?

A. Yes, sir, it was.

Q. How many members were present at that time; do you recall?

A. Also over 90. We had the entire day shift and part of the second shift which was the four-to-twelve shift.

Mr. Fitzpatrick: May I inquire the date of that meeting? I missed it.

Mr. Rotolo: October 23.

The Witness: The twenty-third.

Mr. Rotolo: May we go off the record?

Trial Examiner Leff: Yes.

(Discussion off the record.)

Trial Examiner Leff: On the record.

Will you state the stipulation on the record?

Mr. Rotolo: As a result of an off-the-record discussion, Mr. Examiner, it is stipulated that the company operated its molding department in three separate shifts: One from 7:30——

By Mr. Rotolo:

Q. Will you give them?

A. 7:30 to 4:00; 3:30 to 12:00; 11:30 to 8:00.

[fol. 50] Q. There is an overlapping between the first and second shift?

A. Yes.

Trial Examiner Leff: 3:30 to 11:00?

The Witness: No; 3:30 to midnight, and 11:30 to 8:00 a.m. I can explain that if you want me to.

Mr. Fitzpatrick: I wish you would.

Trial Examiner Leff: Is that stipulated?

Mr. Fitzpatrick: Yes, that is stipulated, subject to my checking on it.

The Witness: The molding machines are heated up, and once they are heated up they can't die out for the six-days they operate. They operate around the clock. Now, the first half hour that a man comes in to work he sort of eases in and replaces whoever has been operating the machine then, and that is the way it works around the clock. The other departments don't operate that way. They don't have that situation. As a matter of fact, the original contract so provided in paragraph 12(b).

Mr. Fitzpatrick: Referring to Exhibit——

Mr. Rotolo: General Counsel's Exhibit 4.

By Mr. Rotolo:

Q. Will you explain how that overlapping between the first and second shift worked? You say the second shift man took the first-shift man out. Where did the first-shift man go to?

A. The first-shift woman—there are women operating generally in the day time—they went into a different department and finished up the last half hour in that department. What happened between the third and second shift I don't know. There were not too many people on those shifts. But I know the women went to another department to finish the day.

Mr. Rotolo: I believe Mr. Maccaferri can give us more accurate information on the operation of the plant, but as a preliminary proposition, Mr. Examiner, in order to [fol. 51] avoid any present confusion by references of this witness to different shifts, I made that request for a stipulation.

Mr. Fitzpatrick: I think the Examiner might well take judicial notice of that fact that injection molding, which is the process here, is a continuous process.

Trial Examiner Leff: I doubt if I can take judicial notice of it.

By Mr. Rotolo:

Q. Now, referring back to this meeting that was held on October 23, you say there were about 90 employees at that meeting drawn from the first shift of molding and other departments of the company that worked during the day.

A. Yes, sir.

Q. Now, was any vote taken at that meeting other than this vote to transfer the affiliation of 3127?

A. There was.

Q. For the purposes you indicated?

A. There was a vote taken on—I don't recall if it was a vote—there was a discussion to present the demands to Maccaferri immediately, and there was some discussion about a strike in the event that he wouldn't accede to the demands.

Mr. Fitzpatrrick: This is still the meeting of the 23rd?

The Witness: Yes, sir.

By Mr. Rotolo:

Q. What demands were they, the demands that had been formulated by Local 22045 on the previous Friday?

A. Yes, sir, the identical demands.

Q. Now, did you have a meeting with Mr. Maccaferri and the union committee present subsequent to that time at which demands were presented?

A. Yes, two days later on the 25th we presented the demands to Mr. Maccaferri. I said to him, "You know, these demands are presented on behalf of 3127."

[fol. 52] He said, "I know all about it. I know everything that took place at your meeting."

So I said to him, "Well, what is your answer to it?"

And he says, "These things are going to cost me $100,000. What have you been figuring out here?"

I said, "Well, we would like to get an answer from you on each of these points."

He explained to me, he said, "You know what my situation is. I am in reorganization. I have to have my auditor prepare my financial report and I will know how far I

can go with you. I will give you an answer in a few days. I need some time."

So we let it go at that.

Mr. Fitzpatrick: What date is that?

The Witness: 25th.

Mr. Fitzpatrick: Might we take a break for a few minutes?

Trial Examiner Leff: We will recess for a few minutes.

(Recess taken.)

Trial Examiner Leff: On the record.

By Mr. Rotolo:

Q. I think you testified when the recess was called, Mr. Saul, that you presented the demands of Local 3127.

Local 3127 presented the demands that Local 22045 had formulated a few days previous as part of its claim of recognition and a contract, is that right?

A. Yes, sir.

Q. Did Mr. Maccaferri raise any question about the claim of 3127 at that time in view of the contract with 22045?

A. None at all. He said he knew all about it.

Q. Did you have another meeting of the employees subsequent to that date, October 25?

A. We had a meeting the following day, October 26.

Q. Yes.

A. Also at the Bedford Park Restaurant.

[fol. 53] Q. Did you at that meeting—were you present at that meeting?

A. Yes, sir. I conducted it.

Q. What was the subject matter of that meeting?

A. We did two things. We advised the membership of our conversation with Mr. Maccaferri the preceding day and we had the membership execute renunciation of their membership in 318 and withdraw all of their membership applications from 318. I have those with me.

Q. Have you that revocation?

A. Yes, sir. There are three sheets.

Q. Were all these signatures obtained at the meeting?

A. Yes, sir, at that meeting. In addition, they signed

some 3127 cards and we didn't have as many people at this particular meeting as we had at the others.

Q. You had some cards you say signed at that meeting for——

A. 3127, yes, sir.

Q. For 3127?

A. Yes, sir.

Q. Do you recall whether the shop chairlady or shop steward—what was her title?

A. Virginia O'Neill.

Q. What was her title?

A. She was Shop Chairlady.

Q. She had been acting as shop chairlady under contract with 22045?

A. Yes, sir.

Q. Was she at that meeting?

A. She came and left. When she came in there was just—just as the meeting was about to start, there was an uproar against her and a couple of other people including Rose Amoroso and Verne Gibson. She said, I don't want any part of the meeting and she stalked out. She was the only one who left.

Q. When was the next meeting of Local 3127?

A. We had a meeting on November 6.

Q. Same place, Bedford Park?

A. That is where all our meetings were held. It was only three blocks from the plant.

Q. Was Virginia O'Neill at that meeting?

A. No, she wasn't.

Q. How many employees were present at that meeting?

A. I don't recall exactly, somewhere between 60 and 90 people.

[fol. 54] Q. What was the subject brought up at that meeting?

A. There was general discussion of what Maccaferri was going to do and I had phoned him several times in the interim and he told me he was still working on—his accountant was still working on those reports. We made a report and there was talk whether or not he was trying to stall and whether we would have a strike. It was just general discussion about a strike. I think we agreed that if we felt

that we couldn't come to some determination with Maccaferri that there would be a strike.

Q. During this interim between October 26, when you had your last conference with Maccaferri on the demands adopted by 3127 and this meeting of November 6, did you file the charges against the company alleging assistance to Local 318?

A. Yes, sir. That was filed on October 31.

Q. Had you had any reports that the company was engaging in any acts of assistance to Local 318?

A. We had gotten complete statements——

Mr. Fitzpatrick: Was that statement concerning the filing of charges—does that relate to the stipulation that on October 31 Local 22045 filed charges?

Mr. Rotolo: Yes. Local 22045.

The Witness: We had gotten——

By Mr. Rotolo:

Q. Will you explain, Mr. Saul, why it is that the charges filed on October 31 were filed by Local 22045 and not 3127?

A. I was trying to keep a correct chronology of what was happening. Before they had actually transferred to 3127 on the 23rd, we found that the employer had paid six workers for going down to 318's office on a Saturday which was a time when 22045 was still representing the people.

Q. I see.

A. Among those workers were Verne Gibson, Amoroso, Pierone, O'Neill, Frace Cincimino, and her husband Al Montopoli.

[fol. 55] Q. Are you sure Peter Pieroni was in that group?

A. I think he was, I am not sure. I think he was there. That was on the 21st of October, on a Saturday. We didn't find out about it——

Mr. Fitzpatrick: I move to strike the reference to what he had found out concerning the payment by the Employer.

Trial Examiner Leff: Motion granted. The question was why was the charge filed by 22045 instead of 312——

The Witness: Because the violation occurred during the period 22045 was representing these people.

By Mr. Rotolo:

Q. All right. Did you try to contact Mr. Maccaferri after you had this meeting on November 6?

A. Yes, a couple of days later, Kahn called me. That was the day we met Maccaferri. He called me in the morning. He told me to go up to the office and I met Maccaferri there. That was, I think, on November 8. We had quite a talk and I raised—I was more concerned at the time with 318's interference than I was with what he would do with the contract and he assured me.

Trial Examiner Leff: Who is "He"?

The Witness: Maccaferri assured me I could completely forget about Tonelli and 318, they were out. With reference to the agreement he said he would sign without Tonelli without anybody telling him what to do it was still a question of what his auditors had to say. He also said to me at that time that he thought they could give a 10-cent increase. That was mentioned at that time.

Q. Did he say he was willing to sign a contract with 3127?

A. Yes, sir.

[fol. 56] Q. Do you know approximately what date that was in relation to that last meeting you had, November 6?

A. That was a couple of days afterward, on the 8th of November.

Q. Do you recall on November 10, Friday, November 10, 1950, receiving a call from the plant, from some employees from the plant?

A. Yes, I did. I got a call from Frank Ciccone. He told me he had been fired. He said they threw out the whole tool room. I says to him, what happened? He said, "Abe, this place is going crazy up here." He said Maccaferri.

Q. Don't go into what he said to you at that time. You received knowledge that Mr. Ciccone was fired, is that right?

A. I got the call from Frank Ciccone, then I got calls from about four other people, all employees in the plant.

Q. Did you go to the plant?

A. Yes, sir. I got up to the plant, I guess, about 4:00 o'clock. I didn't go in. They wouldn't let me in.

Q. Did you attempt to see Mr. Maccaferri?

A. Yes, I tried to get into the office and they told me he was not there. I tried to get into the factory and they wouldn't open the door for me. The watchman wouldn't open the door.

Q. All right. What did you do?

A. Well, there were a bunch of people standing outside. I talked with them. After my conversation, I took some strike and lock-out signs out the car, we penciled in the words Mastro Plastics and P. and D. and we organized the picket line.

Q. How many signs did you give out at that time?

A. I don't recall, somewhere between four and ten. I don't remember how many I had.

Q. You say you got there after four o'clock?

A. About 4:00 o'clock.

Q. When you got there, were there a large number of employees outside of the plant?

[fol. 57] A. Yes. The reason I am not quite sure of the time is that there were quite a few people from the day shift outside and still a few others came out after I got there, so it was somewheres around the break time, somewhere around four.

Q. Did you hold a meeting of the employees at the Bedford Park Restaurant on the following day or——

A. We had a meeting the same day and we organized our picket line and then we had a meeting, I think, the following day, too, but I had a conversation with Maccaferri the following day.

Q. All right. Tell us about the conversation.

A. The following morning, about 9:00 o'clock, there were a few people.

Trial Examiner Leff: November 11, right?

Mr. Rotolo: Yes.

The Witness: November 11, it was Saturday. A few people had gotten in to work. The rest of the people—I think we had all three shifts—were in front of the plant. Maccaferri came out and said hello. I said hello to him and he says "I would like to talk to you."

I said "Go ahead."

He says "No, come inside, let us talk privately" so I

walked inside with him and he said to me, "What is going on here?"

I said "You know what is going on, you started the thing."

He said to me——

Q. What did you have reference to?

A. The discharge of Frank Ciccone. He says that Frank Ciccone is no damn good. He is no good for you and no good for me. I said why didn't you fire him through your arbitration procedure?

He said "I couldn't put up with him." He says "Do you know what you are doing?"

I says "Why did you ask that?"

[fol. 58] He says "You know I understood this was not going to happen."

I says "Who did you understand that from?"

He says "Well, you know, you are supposed to get together with Tonelli on this."

I said "I thought we settled that, Tonelli is out of this thing."

He says "Don't worry, it will be straightened out in a day or two, but let us get straightened out. This is our busy season."

I said I know. He says "I got a truck coming in, will you O. K. it to cross the picket line?"

I said "Are you kidding?"

He says "Just let this one in."

I said "No, I won't." We went outside. In his presence I gave instructions to the picket to stop the truck when it would come.

Q. Do you know how many of the employees——

A. Excuse me, Mr. Rotolo. I also said to him "Look, I don't like violent strikes, there are 100-odd people out in the street and and you have about five or six inside, get them out."

He said to me, "You have my word for that."

I said "Get them out now." They were out within a half hour.

Q. Who were they, do you know?

A. Virginia O'Neill—what is her name again? Alma Swoboda, Henry Iessi, Jerry somebody or other, I don't

remember his last name—we didn't bother the office people at all.

Q. Was Grace Cincimino in that group and her husband?

A. No, I don't think they went in that day.

Q. This picketing continued for some time, did it not, Mr. Saul?

A. Yes, it did.

Q. During this period of this picketing, did you talk with Mr. Maccaferri, at various times either personally or by phone?

A. Yes, I called him on the telephone a few times. I was trying to adjust the thing. He was very abusive.

[fol. 59] Q. Was this during the balance of November and the early part of December?

A. Yes, during November and December, I had a committee up at the office and I had a couple of the girls called—this was right through, we called him on several occasions.

Mr. Fitzpatrick: Do I understand you to say that you had a committee meeting with Mr. Maccaferri?

The Witness: I had a committee of people in my office.

Mr. Fitzpatrick: In your office?

The Witness: Yes, and we called him from my office.

By Mr. Rotolo:

Q. What were the calls for? What was the purpose of these calls?

A. I was trying to settle the thing. I was trying to approach the thing from an intelligent viewpoint and every time I got him on the phone he used the vilest language. He kept saying we were hoodlums and racketeers. He distributed a circular to his people while we were on the line, using, I believe—he used the phrase parasites. This was distributed right after the strike, the week after the strike.

Mr. Fitzpatrick: I will move to strike that.

The Witness: I have——

Trial Examiner Leff: Just a moment. There is a motion. What is the motion? You move to strike what?

Mr. Fitzpatrick: I move to strike the description of a paper which is not produced.

Trial Examiner Leff: Motion granted.

By Mr. Rotolo:

Q. Did these employees inform you at the time that they met you outside of the plant on November 10, what had happened inside the plant?

A. Yes, they did.

[fol. 60] Q. And was the picketing established as a result of those happenings?

A. Yes, it was.

Q. On these occasions when you talked to Mr. Maccaferri subsequent to the beginning of this picketing, did you propose any settlement terms to him?

A. Yes, I offered on every occasion that I talked to him on the telephone or on the one occasion where I talked to him in person—and I also made the offer to Kahn to sit down in front of any arbitration or mediation body in the City of New York. I called the Mayor's office. I called the Federal Conciliation Service. I called the New York State Mediation Board and each one of those agencies tried to arrange a meeting which he refused to attend.

Q. At that time was the petition of Local 65, in which you had intervened, was that still pending to your knowledge?

A. I think it was.

I am not sure.

Q. During these discussions with Mr. Maccaferri, did you tell him that you were willing to have the claim of recognition of 3127 settled by a Board election?

A. Yes, sir.

Q. What was his response to that?

A. Well, the response differed. At one time he wanted an election and we didn't because 318 was in the picture. Thereafter, he didn't want the election and we did.

Q. When was that? When was there that change of policy?

A. When 318 withdrew, I think it was—I will give you the exact date—we picketed Local 318 on December 13, threw a picket on them and I took the picket off.

Q. Why was that action taken, Mr. Saul?

A. Well, some of our members had gotten cards from 318 and had attended a meeting there at which they were requested to cross a picket line and they were told by Mr.

Tonelli that the boss was going to go out of business if they didn't cross the picket line.' That same day, or the day before, I got a call from a Teamster Local in New Jersey telling me that one of their members—

[fol. 61] Mr. Fitzpatrick: Objection.

The Witness: As a result of that call I put a picket on.

Mr. Fitzpatrick: Just a moment.

Trial Examiner Leff: Sustained.

Mr. Rotolo: Never mind.

Mr. Fitzpatrick: The date of this picketing was?

The Witness: December 13.

Trial Examiner Leff: Picketing on 318?

The Witness: Yes, sir. In my presence, Tonelli called Maccaferri. I heard him ask for him. I was on an extension.

By Mr. Rotolo:

Q. Where was this?

A. In Tonelli's office.

Q. Is this at the time of the picketing of Tonelli's office?

A. While my pickets were downstairs.

Q. Were you called in to the office of Tonelli or did you go there?

A. He came looking for me. He asked me if I was trying to ruin him.

Q. What happened?

A. I said "there is only one way I will take these pickets off, you call this guy in front of me and tell him you have no interest and then call your attorney and give him instructions to withdraw from the Board proceedings."

Q. You say you were on a three-way conversation on the telephone?

A. Yes, Maccaferri didn't know that.

Trial Examiner Leff: I am somewhat confused. Would you straighten it out?

Mr. Rotolo: This was in Tonelli's office.

Trial Examiner Leff: I thought you said Tonelli came running to see you.

The Witness: Downstairs.

Trial Examiner Leff: Are you in the same building?

The Witness: No. I was downstairs with the pickets.

[fol. 62] Trial Examiner Leff: I see. Then did you go up to Tonelli's office?

The Witness: Yes.

Trial Examiner Leff: You had a conversation with Tonelli?

The Witness: Yes.

Trial Examiner Leff: Then did you have a telephone conversation with somebody?

The Witness: Tonelli called Maccaferri in my presence and I held an extension to make sure there was no double talk.

Trial Examiner Leff: I see.

By Mr. Rotolo:

Q. Did you hear the conversation between Mr. Maccaferri and Tonelli?

A. Yes, there was a couple of phrases I didn't understand, they spoke in Italian but the rest of it was English.

Q. Did you recognize Mr. Maccaferri's voice on the phone?

A. Yes, sir.

Q. You had talked to him many times before?

A. Yes, sir.

Q. What did Mr. Maccaferri tell Tonelli?

Trial Examiner Leff: First, what did Tonelli tell Maccaferri?

The Witness: He said "Mario, this is Joe Tonelli. Look, I am out of the picture as of now. I got myself into a mess of trouble and I am loaded with pickets."

So Maccaferri says: "Well, I have been able to stand pickets for a month."

He said, "I know, but you are not a labor union." Well, Maccaferri says to him, "I didn't think you were going to do this." He says "I can't help myself. I am out."

Then Maccaferri said something to him in Italian and he replied in Italian. He said "No, I am going to call my lawyer and tell him to withdraw."

[fol. 63] Q. It was after that that you proposed to Mr. Maccaferri that you have a consent election?

A. Yes, sir.

Q. Did you file your own petition for 3127 during that period in December?

A. I believe we did.

Mr. Fitzpatrick: December 12?

By Mr. Rotolo:

Q. December 12. Were you informed by various employees on the picket line that they had received letters of discharge from Mr. Maccaferri?

A. Yes, sir.

Q. During that period around December 12?

A. I think the letter was dated the 12th. I have a group of those letters in my other folder. If you want them, I will be glad to give them to you.

Here is one of them. I have 10 or 12 others if you want them. Here is one addressed to Vernal Gibson. She is here.

Q. This was given to you by Miss Gibson?

A. Yes, these letters were given to me by the various employees who received them.

Q. May I have the rest?

A. I have some more in the office. I think I have 20 or 30 of them all told.

Mr. Rotolo: I will have this marked for identification as General Counsel's Exhibit 7, being a letter addressed to Vernal Gibson on stationery of Mastro Plastics Corporation and signed by the corporation, Mastro Plastics By Mario Maccaferri, president.

Trial Examiner Leff: It may be marked.

(Thereupon the letter above referred to was marked as General Counsel's Exhibit 7 for identification.)

Mr. Rotolo: I will offer it in evidence, Mr. Examiner.

Mr. Fitzpatrick: No objection.

Trial Examiner Leff: May I see it, please?

Mr. Rotolo: Yes.

[fol. 64] Trial Examiner Leff: General Counsel's Exhibit No. 7 is admitted.

(Thereupon the letter previously marked for identification as General Counsel's Exhibit No. 7 was received in evidence.)

By Mr. Rotolo:

Q. After you received these letters from the employees on the picket line, did you attempt to get in touch with Mr. Maccaferri about them?

A. Yes, I did. He refused to discuss them with me. He said that he had a lawyer named Fitzpatrick handling it.

Q. Is that the first time you had heard about Mr. Fitzpatrick in the case?

A. Yes, sir. I believe I tried to call Mr. Fitzpatrick's office and I couldn't get him. I couldn't get his full name from Maccaferri. I talked to Maccaferri on various occasions in the Magistrate's Courts during the months of December and January.

Q. What was the occasion of being in the Magistrate's Courts?

A. Some of our people had been arrested and we had gotten summons against Maccaferri for assault. These cases were continually coming up in the courts, I believe. There were a total of 21 of them.

Trial Examiner Leff: 21 cases against Maccaferri?

The Witness: Against our people and Maccaferri. The cases against his people totaled about five and the ones against our people about 16.

By Mr. Rotolo:

Q. What do you mean by his people?

A. The people whom he had gotten across the picket line.

Q. I see.

A. Then he complained to the District Attorney in Bronx County and they brought us down and he was there. I tried to talk to him. I said to him "Why don't you [fol. 65] straighten this thing out and get these people back to work?"

He said the hell with them and the hell with you. I talked to him in the Magistrate's court about sometime in the beginning of February. He tried to punch me. I figured I better walk away because there was no point in talking to him.

Mr. Fitzpatrick: I object to that and ask that it be stricken.

Mr. Rotolo: I think it is part of the whole picture, his attitude.

Trial Examiner Leff: I will let it stand.

By Mr. Rotolo:

Q. When did this picketing come to an end, Mr. Saul?

A. The picketing came to an end, I think, about the end of January, the beginning of February.

Q. Yes.

A. We got authorizations from the people and we sent a letter with an unconditional application for re-employment. I think that letter was sent February 1.

Q. Perhaps I can refresh your recollection.

Mr. Rotolo: I offer these for identification, these two carbon copies. I called for the originals of these two letters, Mr. Examiner, by subpoena——

Trial Examiner Leff: I don't suppose there will be any objection to the question of copies. You are remembering to supply duplicates of all these exhibits?

Mr. Rotolo: I will have duplicates. As I get the exhibits, I will have them photostated.

The Witness: We sent them registered.

Mr. Rotolo: Mr. Examiner, I offer for identification as General Counsel's Exhibit——

Mr. Fitzpatrick: Let us shorten this. We will concede that under date of March 9, 1951, both of the Respondent corporations received letters identical in wordage——

[fol. 66] Trial Examiner Leff: What date is that?

Mr. Rotolo: The letters are dated March 9. They were delivered on March 12.

Mr. Fitzpatrick: We will stipulate March 12 is the date of delivery.

The text is identical in Board's Exhibit 8 and 9 which are herewith offered by the Board without objection on the part of the company.

(Thereupon the documents above referred to were marked as General Counsel's Exhibits 8 and 9 and were received in evidence).

Mr. Rotolo: General Counsel's Exhibit 8 is the letter addressed to Mastro Plastics and signed by A. Roberts,

representative of Local 3127 and General Counsel's Exhibit 9 is addressed to French-American Reeds, same text, signed by the same person. They are on the letterheads of Local 3127.

Trial Examiner Leff: May I see them, please?

Mr. Rotolo: Yes.

Trial Examiner Leff: General Counsel's Exhibits 8 and 9 are admitted.

By Mr. Rotolo:

Q. Now, Mr. Saul, I show you General Counsel's Exhibits 8 and 9 and I will ask you whether those are the letters which were sent by your office to the Respondents?

A. Yes.

Trial Examiner Leff: It has been admitted that they were sent and received.

Mr. Rotolo: I want to ask him another question. It is preliminary.

Trial Examiner Leff: I am sorry.

By Mr. Rotolo:

Q. Had the picketing terminated when these letters were sent out?

A. Yes, sir.

[fol. 67] Q. Had you received authority by the various employees on picket-line to send this letter?

A. Yes, sir.

Mr. Fitzpatrick: I object to the form of the question.

Mr. Rotolo: It is a matter of agency.

Trial Examiner Leff: He is objecting to the form, I presume, on the theory that it calls for a conclusion.

Mr. Rotolo: I will withdraw the question.

By Mr. Rotolo:

Q. Prior to sending this letter out, Mr. Saul, what did you get from each of these employees that were still out on the picket line?

A. I had secured authorizations from them. I called them together and advised them of what we were doing and they had signed various authorizations permitting

us to send this letter. I believe we started that procedure on February 1.

Mr. Fitzpatrick: I object to a description of documents not offered for the record.

The Witness: May I get my folder?

Trial Examiner Leff: Yes.

By Mr. Rotolo:

Q. Maybe we can expedite this. Did all of the employees involved give you written application or were there some written and some oral?

A. Most were written. We had some oral authorizations.

Q. You say you have a record of some written authorizations given to you beginning with February 1?

A. Beginning with February 1.

Q. All right.

Mr. Rotolo: I would like to have this marked for identification as General Counsel's Exhibit 10.

The Witness: That is what I was looking for.

[fol. 68] (Thereupon the document above referred to was marked as General Counsel's Exhibit 10 for identification.)

Mr. Rotolo: General Counsel's Exhibit 10 for identification is a letter on the stationery of Local Union 3127, Carpenters, dated February 1, with a list of names attached. In fact, these are a series of three letterheads attached together. The first one of which is dated February 1, 1951. The subsequent ones attached have no date but they contain signatures. The top one has certain language indicating authorization to Local 3127 to make an unconditional application to Mastro Plastics and French-American Reeds by these employees to return to work.

Do you have any objection?

Mr. Fitzpatrick: May I inquire, Mr. Witness, did you see these signatures affixed?

The Witness: Most of them.

Mr. Fitzpatrick: Do you know what the employment status of these people was at the time they affixed it?

Mr. Rotolo: That calls for a conclusion, Mr. Examiner.

Trial Examiner Leff: I sustain it. That is beyond the

voir dire. It may possibly be permissible cross examination, but it isn't permissible at this time.

Mr. Fitzpatrick: I object then on the ground that no foundation has been made as it is not shown at the time this was signed the purported signatories were employees.

Trial Examiner Leff: How were the signatures obtained, Mr. Saul?

The Witness: In some cases, I went up to——

Trial Examiner Leff: By that I mean, what was the procedure followed?

[fol. 69] The Witness: I went up to the picket line and I talked to the people and I had them sign it.

Trial Examiner Leff: Yes.

The Witness: Others I called up and they came down to the office. The midnight shift when they got through in the morning, they came down in the office and signed it.

Trial Examiner Leff: Were they signed in your presence?

The Witness: Most of them, yes. The few that weren't signed in my presence, were signed in the presence of Al Roberts who had that when I didn't go with it.

Trial Examiner Leff: Who is Al Roberts?

The Witness: A representative of 3127. The majority of them were signed in my presence.

Mr. Rotolo: Had you given Mr. Roberts one or more of these sheets with signatures to bring back to the office?

The Witness: I had the sheet, if I didn't have them, Roberts had them. If I was out of the office when one of these people came in, Roberts got the signature.

By Mr. Rotolo:

Q. I see.

Trial Examiner Leff: I will overrule the objection and admit it. I don't understand why it is so important. Normally if there is a group of employees striking and the union makes an unconditional application of reinstatement on behalf of all striking employees, the agency is suing by virtue of union representation. You don't require proof of agency.

Mr. Fitzpatrick: I am not so much concerned about that

as with the following implication: As your Honor will recall, the Act defines employee in terms of one who has [fol. 70] not secured substantially equivalent employment, and as of the date of March 9 on which this exhibit bears, it does not appear to be established that any one of these people had failed to secure substantially equivalent employment. If they had secured such employment at that time, they would, of course, not be employees within the meaning of the Act. I object to a mass offer of proof on that score.

Mr. Rotolo: May I be heard?

Trial Examiner Leff: Yes.

Mr. Rotolo: Our contention is that the employees if they were on strike were unfair labor practice strikers with a result that their employee status with the company had never ceased to exist, or the other theory, if they were discharged on December 10, they had a right to seek reinstatement and remedy of the unfair labor practice arising from the discharge. So the whole question of whether they sought other employment or whether they had other employment does not necessarily take away their right to reinstatement to their job.

Trial Examiner Leff: You mean where employees are discharged, even though they secure other employment, they are still entitled to reemployment in their jobs?

Mr. Rotolo: That is right.

Trial Examiner Leff: I think that was established clearly enough by the Supreme Court in the Phelps-Dodge Company.

Mr. Fitzpatrick: I only want to point out the definition, the Act makes a conjunctive and not disjunctive reference.

Trial Examiner Leff: The fact that I admit this document doesn't preclude you from urging your legal objection.

[fol. 71] Exhibit 10 is admitted.

(Thereupon the document previously marked for identification as General Counsel's Exhibit 10 was received in evidence.)

Mr. Rotolo: I am finished with this witness. This will be a good time to break for lunch.

Trial Examiner Leff: We will recess until 1:30.

(Whereupon, at 12:30 o'clock p. m. the hearing was recessed until 1:30 o'clock p. m. of the same day.)

AFTERNOON SESSION

(Whereupon, at 1:30 o'clock p. m. the hearing was reconvened.)

Trial Examiner Leff: The hearing will come to order. Please proceed, Mr. Rotolo.

Mr. Rotolo: That will be all with this witness, Mr. Examiner.

Cross examination.

By Mr. Fitzpatrick:

Q. Mr. Saul, in your testimony yesterday you gave your address as 130 West 42nd Street. Is that your business address or your residence?

A. Business.

Q. What is your residence address?

A. I would rather not give that.

Mr. Fitzpatrick: Will you direct the witness to answer?

Trial Examiner Leff: Let him have your residence address.

The Witness: 142 Orchard Street, New York City.

By Mr. Fitzpatrick:

Q. In what department of the State were you admitted to practice?

A. First Department.

[fol. 72] Q. You testified yesterday when I asked you about "your organization" that you had five unions?

A. That is right.

Q. Comprehended in that term?

A. That is right.

Q. Let me have the name of the five unions.

A. Picture Frame Workers Union.

Q. Yes.

A. Local 3127.

Q. Yes.

A. That is U. B. of C. and J. of A.

Q. Is the Picture Workers Frame an International?

A. A. F. of L.

Q. Does it have a number?

A. 18465. It is a Federal Local.

Q. All right.

A. Local 22045, A. F. of L. That is a Federal Local. Those three I serve as a business representative and attorney.

Q. Yes.

A. I am also attorney for 102, United Automobile Workers, A. F. of L.

Q. Yes.

A. And Local 648 of the same International. Do you want to know any other unions I have represented?

Q. No, I am not interested in your representation. These other two unions have the same address as the 3——

A. No, they haven't.

Q. As the three you previously mentioned?

A. No, they haven't.

Q. What is their address?

A. 51 West 35th Street, New York City 1.

Q. That is for both 102 and 648?

A. Yes.

Q. And the other three have the address you have given as 130 West 42nd Street?

A. That is correct.

Q. I want you to tell me, Mr. Saul, whether all of the meetings with Maccaferri are noted in your diary to which you have referred for the refreshment of your recollection here?

A. Yes, they are.

Q. There is no meeting which you had with Maccaferri which is not mentioned in that diary?

A. I don't think so.

Q. Certainly, you haven't testified to any here.

A. You say there is no meeting which is not mentioned? Yes, there may be meetings which are not in the diary.

[fol. 73] Q. But you haven't testified as to any of them here?

A. I don't believe so.

May I qualify that except for the meetings at the District Attorney's office and the Courts?

Q. They are not mentioned in your diary?

A. No.

Q. All right. I want you to go back to the telephone conversation you had with Mr. Maccaferri following your first talk with Tonelli. You have described it as an angry conversation, but I don't think you gave us the substance of it. I want you to give us the substance.

A. Following my first talk with Tonelli?

Q. Yes.

A. Let me see——

Q. I believe you testified that conversation was held on September 23.

A. My conversation with Tonelli was on September 23. I talked to Maccaferri after that. I don't think I got him the same day. I think I got him the Monday following.

Q. I recollect that you did testify it was the Monday following. What was said by you and what was said by him?

A. As I recall, I told him that Tonelli was not interested in representing him but was interested in taking the shop over. I asked him what his idea was in insisting that I go down to see him. He told me Tonelli was a good friend of his, that he represented the union at Banner Plastic and some man, whose name he mentioned and whose name slips my mind, owned Banner Plastics and was one of his stockholders and he was not going to do anything unless Tonelli okayed it and Tonelli was not interested in coming in but was interested in helping him out so he could keep 65 up and he could continue dealing with us. I told him——

Q. This is what Maccaferri told you in the conversation?

A. This is part of the conversation.

Q. Over the telephone on the 25th?

A. That is right.

Q. Right.

A. Yes.

Q. Go on.

A. I told him that that wasn't the impression that I had gotten from Tonelli and that it had better stay that way.

[fol. 74] Q. Is that all you recall of the conversation?

A. Basically, that is all.

Q. What had he said to you at the meeting of September 23 about Tonelli?

A. What had who said to me?

Q. Maccaferri?

Mr. Rotolo: He has already testified as to what was said.

By Mr. Fitzpatrick:

Q. I am asking him again.

A. You mean when he asked me to make the appointment?

Q. Yes.

A. He asked me to make the appointment before September 23. I think I talked to him two or three days before that and he said to me I won't sign a contract unless Joe Tonelli O. K.'s it. I said to him, "Who is Joe Tonelli?" I had never heard the name. At that point he told me that Tonelli represented a labor union, that he was a vice-president of an International. I said "Since when do I negotiate an Employer contract with labor union people," I said, "What are you trying to do bring another union in?" And he said no, Tonelli is a friend of mine. If he O. K.'s the contract, I will sign it. That was the time I demanded the twelve and a half cent raise, an extension of the original agreement. It was about the third week in September. I will give you the exact date if you want it. It was on September 20.

Q. What motivated you to go to see Tonelli thereafter?

A. Well, I was motivated in seeing Tonelli by a desire to conclude an agreement without a strike, if possible, and Maccaferri, whom I have known in the past, is a very temperamental individual, insisted that I sign this fellow before he signed an agreement, I went to see him with the hopes of effecting an agreement. Another reason that motivated my calling him was the fact that in the two years that I had been dealing with Maccaferri, he had had about 15 different agents representing him, so I assumed that this was merely another one.

[fol. 75] Q. You went down to see Tonelli prepared to discuss your demands, is that it?

A. No, I didn't go down to see him prepared to go down to discuss demands. I went down to see Tonelli to find out what the devil he was doing in this picture and to tell him if he was trying to move in on it to get out and if he was just trying to be helpful, to tell him to use his good influences with Maccaferri to expedite this thing.

Q. What conversation did you have with Tonelli on the 23rd?

A. I went down and I introduced myself. He was fairly cordial at the start. He said to me, "You know, that is not your jurisdiction." I said, "Isn't it?"

He said "No, it is mine." I said, "Since when does the Paper Box Union have jurisdiction over plastics?"

There was a little discussion about jurisdiction. I finally advised him that the people had designated us to represent them and I had not come down for the purpose of talking jurisdiction. He said, "Well, what is the problem?"

I says, "The only problem I have is that I got a stubborn boss down there unless you O. K. it. What is your interest?"

He said, "I have got Banner Plastics and I would like to get the whole industry."

I said, "Why don't you go after them, there are plenty of shops that aren't organized. I can walk in here and get a contract and nobody will be out of work and everything will be fine. I can get 65."

He said never, but I think I can. I said, "For your information, we get them in a shop and we will do it again if we have to but I don't think they are that important."

"I think you should use your good offices with Maccaferri."

He said, "Would you be interested in looking for the job to my Local?"

I said, "Who is going to pay for it, you or Maccaferri?"

He said, "Not Maccaferri. I am after membership. I want this industry."

[fol. 76] I says, "I have no authority to sell the shop to anybody."

He said, "It is a legitimate union deal."

I said, "I didn't say it wasn't. I have no authority."

He said, "Will you give me an answer?" I said, "I can't give you an answer. I have to take it up with the Board. I am positive the answer will be no."

He said, "If it is no, I will take Maccaferri to go along with you."

With that I left him.

Q. Was any amount of money mentioned?

A. No.

Q. Did you subsequently take it up with your Board?

A. No, I took it up with Mr. Rothenberg. I never mentioned it with the Board.

Q. Who is Mr. Rothenberg?

A. He was the business agent of the union.

Q. Which union?

A. 22045, and he was the secretary. He was also a business representative of 3127.

Q. Did he have any function in the picture frame workers?

A. Yes, he was the business agent for them.

Q. Did he have any function in the two U. A. W. Locals?

A. None at all.

Q. Were there any other officials of those unions which they had in common?

A. Any other officials of what unions?

Q. Picture Frame Workers, 3127 and 22045?

A. The only official in common between 22045 and 3127 was Sam Rothenberg.

Q. Yes.

A. The Picture Frame Union was an offshoot of the Carpenter Union and I think four out of five officers were identical but none of them were officers of 22045.

Q. I see in the correspondence the name Roberts. Who is Mr. Roberts?

A. He is a business representative working for all three unions.

Q. Are there any other business representatives who represent all three unions?

A. Yes, Harry Fine—are you talking as of that date?

Q. Yes.

A. That is all.

[fol. 77] Q. How about since that date?

A. Well, there is going to be another one coming to work very shortly.

Q. Is Mr. Rothenberg related to Mr. Roberts?

A. Yes. He is his father.

Q. When you were talking to—withdraw that. Who was on the executive board of 22045?

A. Louis Cammarato.

Q. What shop?

A. What shop does he work in?

Q. What shop?

A. Jayem. Frank Karnback.

Q. What shop?

A. Jayem. Lulu Mae—I can't think of her last name at the moment. She worked in Cole Steel and there were two other officers but I can't remember their names.

Q. Can you remember the shops in which they worked?

A. Cole Steel and one worked in Artiloid.

Q. None of the executive board members of 22045 was employed in Mastro Plastics or French-American Reeds?

A. No.

Q. How about 3127?. Who was the Executive Board of 3127?

A. Wilfred LaMonreux.

Q. What shop is he in?

A. We worked at the time for Master Art. Harry Meyers, who worked for Freedman.

Nick Pandolf worked for New York Graphic, Joe Frazier worked for New York Graphic. Al Maylander worked for Andries—there were about three others.

Q. Did Local 22045 have general membership meetings, meetings at which all shops got together?

A. Yes, one annually.

Q. What is the specified annual date?

A. There is no specified date. The meetings are called. The annual meetings are generally called in November or December.

Q. How about Local 3127 in that respect?

A. Local 3127 has four meetings, one called each quarter and then any special meetings that may be required. They average about five meetings a year.

Q. In 1949—I withdraw that. In 1950, when did 22045 have its general membership meeting?

A. I believe they had that meeting while—1950?

[fol. 58] Q. 1950.

A. I believe while Mastro was out on strike.

Q. Sometime between November 10?

A. About the end of November.

Q. They had not had a previous meeting for——

A. Maybe 12 or 14 months.

Q. 12 or 14 months?

A. 12 or 14 months.

Q. When with relation to November 10 did 3127 have a general membership meeting?

A. I think they had one in August of that year and then they had another one in December.

Q. The latter would be after the strike?

A. I beg your pardon?

Q. The latter meeting was after the strike?

A. Yes.

Q. When did you first become cognizant of Local 65's organizing campaign?

A. I heard something about it, I think, in August. That is about when I heard of it for the first time, in August.

Q. What did you do about it?

A. Nothing. I made a few inquiries. It didn't seem to amount to much.

Q. Do you know where the cards were signed?

A. Well, I understood that a few cards were signed. Our inquiries and the information given to us by our members indicated, that it was a half-hearted drive and that they hadn't gotten many results at that time.

Q. What was the reason for trying to open negotiations with Mastro on September 7?

A. Well; there were various reasons. Number 1, we were generally in our negotiating season in September. I have always been very anxious for any agreement to end September 14 because most shops become busy after Labor Day and I like to have a contract end with an Employer when he is busy. Maccaferri jockeyed me from September to August and I wanted to get back into the September situation. We were not too far away from the time that notice would have

to be given; secondly, and I wanted an extension of the agreement and I wanted an increase for the people.

[fol. 79] Third, the previous increases had been very small increases, I think, amounting to a five-cent increase divided into three and two and I wanted to get them some more money. They were yelling about it any time we had a meeting.

Q. Was there any proposal to advance the expiration date of the contract?

A. Every time I talked to Maccaferri, I always said I wanted the contract to end in September.

Q. You so stated, but what I mean is on September 7, did you propose that he immediately rewrite the contract, the new contract in September?

A. Well, I proposed an increase which I assume would be effective as soon as we agreed upon the terms and any contract that we run, runs either a year or two years and it ends on the anniversary date of the time it starts.

Q. I would like you to be as specific as you can. Did you say to Maccaferri you were demanding something effective as of September or any other time before the expiration of the contract?

A. Yes, I told Maccaferri I wanted a twelve and a half cent increase with all the terms and conditions to remain as is, and we will extend the agreement.

Q. In other words, you were proposing to re-write the contract at that time with a different commencement date and cancel the old contract?

A. Not necessarily. The manner in which we operate, we extend the original agreement by a memorandum of agreement.

Q. Yes.

A. That memorandum of agreement would have only had to modify two paragraphs, one, it would have had to delete the previous increase paragraph and substitute the new one and two, it would have had to delete the previous expiration date and substitute a new one and that is all, and all other terms and conditions of the contract would have been retified.

Q. That is the only thing you proposed at that time?

A. Yes. I didn't mention in so many words an expira-

tion date, but if he had agreed, that is the way I would have prepared it.

[fol. 80] Q. Were those demands formulated at some meeting you had with the shop?

A. No. The meeting we had was later. The demands were submitted as a result of previous meetings that we had and as a result of inequities and wage rates which we felt existed and as a further result of the low level of wage rates that were in existence. He had an average rate in that shop that was below $1.00 an hour. We were trying to bring it up and you couldn't bring it up too fast.

Q. Was there any proposal to deal with rates on an inequities basis?

A. Not as such. When we negotiate for a shop we negotiate on the basis of the entire shop not as individual. During the contract year, we try to bring up individuals to wipe out the inequities which is at best a difficult procedure. We had been able to do it in some instances at Mastro, I think their payroll data will show. We brought up a few, others he yelled about. In order to solve the situation, we were asking for a blanket increase.

Q. These demands of September 7 were for 12 and one-half cents across the board and a new expiration date on the contract?

A. I think the demands were made on September 20, if I am not mistaken.

Q. You may be right although I do have a note——

A. September 7 is right.

Q. September 7?

A. Yes. You are right.

Q. You did, however, have a shop meeting in the afternoon of September 14; didn't you?

A. Yes. That is when we reported to the people as to the demands we had made.

Q. Where was that meeting held?

A. The Bedford Park Restaurant, in the meeting hall downstairs.

Q. What did the people say?

A. Pardon?

Q. What did the people say when you made the report?

A. They said "We hope you get it." They voted ap-

proval of it. They were tickled pink to get a raise of that proportion there.

Q. In other words, they approved it?

A. Yes.

[fol. 81] Q. Were there any suggestions made for further demands at that time?

A. Oh, yes, at every meeting there were suggestions made for additional demands, but the meeting passed and approved the original demand made without any amendments thereto.

Q. So that your position as to demands was the same right up until the meeting of October 23?

Mr. Rotolo: October 20.

The Witness: October 20. Our formal position was the same, yes.

By Mr. Fitzpatrick:

Q. Did you have at any time a meeting with a good part of the membership in the plant?

A. Yes, I had one meeting.

Q. When was that?

A. It was right after working hours, sometime in the—I can tell you better by the date of this thing—sometime in October, I think. Yes, sometime in October.

Q. Fix it as close as you can.

A. I would say the first week in October.

Q. Yes?

A. It was not in the factory.

Q. Where was it?

A. It was in an adjacent building that was being constructed, that was in the process of construction.

Q. Does your diary contain any note of that meeting?

A. No, I don't think so. Let me see. No.

Q. What was discussed at that meeting?

A. There was a general discussion on the purposes and intents and names of our union and the intent and names of Local 65.

Mr. Rotolo: What was the date of that meeting?

The Witness: Sometime in the beginning of October. That meeting was held the same day I met with Maccaferri to discuss the reinstatement of the Purris, because I re-

[fol. 82] member that in my conversation with Maccaferri, and I don't think I brought this out on your examination, Mr. Rotolo, he told me that he had spent $1,500 for this publicity man and he thought the union should give it back to him.

By Mr. Fitzpatrick:

Q. What happened at that meeting?

A. At that meeting, I got all the people together and I asked him if they had any gripes and if any of them preferred 65 to us, I would like to know why. I think the majority of them didn't like 65. There were a couple of people who while they didn't say they liked 65, said they thought 65 could do a better job than we had been doing. I told them that we were only as good as the members we had in the shop and that 65 or any other labor union could be no better than the people they represented. I showed them that at no time during the two years that we had been under agreement with Maccaferri had anything ever been done in that plant without the approval of the entire plant, nor had any grievances or negotiations been entered into without a committee of the shop that they had selected being present.

The final result was a vote of confidence in our Local.

Q. How long did the meeting last?

A. I would say about 30 minutes.

Q. Were night shift people present?

A. No, they couldn't have been.

Q. Only day shift?

A. There are three shifts. I think only the day shift was there. Very possibly, a couple of the afternoon shift people were there. If they were, I don't recall. I don't believe so, sir.

Q. What form of announcement was used to convene the meeting?

A. I think I stood at the time clock with Virginia O'Neill as the people were punching out and said "Don't go home, go into the other building, we want to hold a meeting."

[fol. 83] Q. There was no written announcement about the purpose of the meeting?

A. No. The meeting was a spur of the moment thing impelled primarily, by Maccaferri's obsession about 65.

He was so jumpy about them and he got all excited. He said these people are going to ruin them and I think you brought them in and all that sort of business. If I recall correctly, I conducted that meeting more to satisfy Maccaferri that we were not instrumental in bringing 65 into the picture because that is what he accused us of as well as to satisfy any members who had any questions in their mind.

Q. But Local 65 was the only thing discussed at that meeting?

A. That is right.

Q. At any of your other meetings, did the subject of 65 come up for discussion?

A. They would discuss generally—we had a period of confession at one of our other meetings when a couple of members said "We were with 65 but we are sorry now," and that sort of business.

Q. Which meeting was that?

A. At one of the subsequent meetings in October. I think it was the one on October 23 when we were so outraged about 318.

Q. October 6?

A. No, that was much later, I think.

Q. It was?

A. That was October 23.

Mr. Rotolo: There was a meeting before that, the 20th?

The Witness: Yes. Yes. But at that meeting before that, I think we signed some renunciations or something. There was one meeting that we signed some papers withdrawing any authority from 65—I have the papers somewhere unless they are part of the exhibits.

By Mr. Fitzpatrick:

Q. Were there any minutes kept at any of these meetings that you conducted?

A. Not as formal minutes, they,—these were only shop meetings. The minutes were made in this type of form (indicating).

[fol. 84] Q. Notes?

A. Regular written notes on slips of paper. Then later on, occasionally, I would transcribe some of them to a type-

writer myself and get them in this type of form (indicating).

Trial Examiner Leff: Let the record show that the witness has exhibited some papers that he has in his file.

By Mr. Fitzpatrick:

Q. Is this transcript one of the meeting of the 20th?
A. I will have to look at it.
Q. Here, you are.
A. Yes.
Q. May I see it again, please?
A. Yes.
Q. Is this based on handwritten notes which are here?
A. Yes.
Q. May I inspect the handwritten notes under it?
A. Please do.
Q. Designate for me which are the handwritten notes.
A. The yellow sheets.
Q. How about these?
A. They are all part of it, these two meetings—and you have the date in the upper left-hand corner of the yellow sheet—the 20th and 23rd of October. At these two meetings, the demands were formulated and the switch to 3127 was made.
Q. I see here a paper, a yellow sheet containing a list of names, nine names, opposite each of which has been set what is apparently a department or shift.
A. Yes.
Q. Are they the people who are designated as members of the enlarged committee on that day?
A. Yes, in addition to those names, members of the previous committee who may not have been included in that committee——
Q. I see nine names here——
A. I think there were five others.
Q. ——who already had office?
A. Yes, who had served as a committee. At one of the meetings, they wanted to get rid of all of the committee people. Those are settlement notes.
[fol. 85] Q. This white paper has no relation to this?

A. No, that is a note I made in relation to a settlement proposed by Mr. Kahn.

Q. All right. How long did the meeting of the 20th last?

A. I don't think any of the meetings ever lasted more than an hour. The people were always anxious to go home. The women had to prepare supper for their husbands and all. We usually get out at five-thirty or quarter to six at the latest, never later.

Q. Local 3127 has a welfare fund?

A. Yes.

Q. Has Local 22045?

A. No, it hasn't.

Q. What is the assessment for the 3127 fund?

A. You mean what do we receive from an employer?

Q. Yes.

A. At the present time?

Q. Yes.

A. Five per cent.

Trial Examiner Leff: From——

The Witness: From the Employer. There is no contribution from the Employee.

At that time it was three per cent.

By Mr. Fitzpatrick:

Q. At that time it was 3 per cent?

A. Yes.

Q. When did it change?

A. I think last September.

Q. It wasn't until September, 1951, that a change from 3 to 5 per cent was made?

A. That is right, except that in a couple of shops that I negotiated, knowing we would demand more, I think in July we got a higher percentage. The percentage, at the present time, is not a level percentage because some contracts expire a year later, some are two-year contracts, but we are trying to equalize it to a five per cent thing.

Q. I notice that in your typewritten transcript which you say is a transcript of the same meeting, you have an item "9" here which reads "A five per cent union welfare

fund to cover all members for disability, sickness and distress".

A. That is right.

[fol. 86] Q. Whereas on the yellow sheet you have a notation "3 per cent welfare".

A. Knowing Maccaferri, you had to ask for five to get three. If you asked him for three to start with, you would wind up with one. When we submitted it, we ask him for five.

Q. Did you submit this to Maccaferri?

A. I think he got a copy of that.

Trial Examiner Leff: When you say this, will you describe it for the record?

Mr. Fitzpatrick: I am sorry, the paper lacks description.

The Witness: It is a typewritten sheet containing a list of demands proposed to be submitted to him.

Trial Examiner Leff: All right.

Mr. Fitzpatrick: May I offer it in evidence?

The Witness: I will take it out.

Mr. Fitzpatrick: This and the two yellow sheets.

Trial Examiner Leff: Let us get a description of what they are and mark them. Let the witness confirm the description, then offer them.

Mr. Rotolo: I am sure Mr. Saul would like to keep his original notes.

The Witness: I can prepare photostats and have them submitted.

Trial Examiner Leff: We can agree we can substitute photostats for the originals.

The Witness: Do you want to mark them for identification?

Mr. Fitzpatrick: May the yellow sheets be marked Respondents' Exhibit 1? A yellow sheet——

Trial Examiner Leff: Let us describe it as follows: Referring to the paper that Mr. Fitzpatrick holds in his hand, and which has been marked Respondents' Exhibit 1, can you tell us in a few words, what that paper is?

[fol. 87] The Witness: Those are notes made of demands formulated at two meetings held by the members of Mastro Plastics, and French-American Reeds on or about the 20th or 23rd day of October, 1950.

Trial Examiner Leff: Thank you.

(Thereupon the papers above referred to were marked as Respondents' Exhibit 1 for identification.)

Trial Examiner Leff: You offer it in evidence?

Mr. Fitzpatrick: I offer it in evidence.

Trial Examiner Leff: Show it to Mr. Rotolo.

Mr. Fitzpatrick: Is this part of the same thing?

The Witness: That is part of the committee that was elected that date.

Mr. Fitzpatrick: One yellow sheet on which is written transversely a list of names and departments opposite the names——

Trial Examiner Leff: What shall we call that, Respondents' Exhibit 2?

Mr. Fitzpatrick: Yes.

(Thereupon the document above referred to was marked as Respondents' Exhibit 2 for identification.)

Trial Examiner Leff: Those notes were made at the same meeting to which you have just referred?

The Witness: Yes.

Trial Examiner Leff: They are in your handwriting?

The Witness: No. They are not. I conducted the meeting. The notes were made by Mr. Rothenberg.

By Mr. Fitzpatrick:

Q. Mr. Saul, this paper which I now hold in my hand is a transcript of the demands formulated at those two [fol. 88] meetings which you believe were delivered to Mr. Maccaferri?

A. Yes, sir, and typed by myself.

Mr. Fitzpatrick: I ask that this be marked for identification.

Trial Examiner Leff: It may be marked Respondents' Exhibit 3.

(Thereupon the document above referred to was marked as Respondents' Exhibit 3 for identification.)

Trial Examiner Leff: Any objection, Mr. Rotolo, to Respondents' Exhibits 1, 2 and 3?

Mr. Rotolo: No.

Trial Examiner Leff: They are admitted.

(Thereupon the documents previously marked for identification as Respondents' Exhibits 1, 2 and 3, were received in evidence.)

By Mr. Fitzpatrick:

Q. On Respondents' 1, both dates, October 20 and October 23 are listed in the upper right-hand corner approximately opposite the wording "Day and night"—were there two meetings—were they held one for the day shift and one for the night shift or were they both general meetings?

A. They were both general meetings of all shifts.

Q. Of all shifts?

A. Yes.

Q. I see. Were these prepared at the meeting?

A. Were these papers executed at the meeting?

Q. Yes.

A. Yes, sir.

Q. You mean written out at the meeting?

A. Yes.

Q. Referring to Respondents' Exhibit 1?

A. Yes, sir.

Q. And the handwriting is that of Mr. Rothenberg?

A. Yes, sir.

Q. At which meeting, which of the two meetings, was it prepared?

A. Both. He had the note and he brought it back to the October 23 meeting with him and he continued writing on it.

[fol. 89] Q. All right.

A. May I take those?

Trial Examiner Leff: The witness has requested leave to withdraw Respondents' 1, 2, and 3 for the purpose of having them photostated so that photostatic copies may be substituted for the original.

The Witness: I don't need it.

Trial Examiner Leff: Did you change your mind?

The Witness: Yes.

Trial Examiner Leff: We will simply ask Mr. Fitz-

patrick to photostat them to supply the duplicates needed by the Board.

Mr. Rotolo: You can have Mr. Fitzpatrick photostat them and return the originals to you if you so request.

The Witness: I so request.

Trial Examiner Leff: Very well. Mr. Fitzpatrick will photostat them and return the originals to you.

By Mr. Fitzpatrick:

Q. I want you to again recall for me whether it was at the meeting of the 20th or at the meeting of the 23rd that the question of shifting from 2204-5 to 3127 was discussed?

A. I think it was originally discussed at the 20th, just generally, on the question of the welfare, but it was tabled until the next meeting and we originally anticipated the next meeting to take place sometime around the 26th or 27th but the events of the 23rd necessitated the emergency meeting of the 23rd at which time the transfer was voted through right then and there.

Q. Do you recall what day of the week the 23rd was?

A. Monday.

Q. Between October 23 and November 10, you had only two meetings with Mr. Maccaferri, did you not?

A. October 23 and November 10—yes, sir, I think that is right.

Q. One of them was on the 25th of October and the other was on the 8th of November?

A. That is correct.

[fol. 90] Q. In between those times, would you say that he had consulted his accountants?

A. I don't know whether he said, that is what he said.

Q. You said that is what he said he was doing. Did he at any time during that period indicate that he would not deal with you?

A. No, sir. On November 8 he told me he was going to deal with me.

Q. On November 8 he made an offer to you of ten cents?

A. No. He said Tonelli was out of the picture and he thought he could pay 10 cents. It was not an offer as such, but he thought they could go to ten cents, but the

rest of the conditions depended upon what the accountant told him or the auditor, he called him.

Q. Let me see now if I get this picture correctly. On November 8, he said that he still had to have the auditor's advice on your fringe demands?

A. He said he did not have the auditor's report as yet, that I knew that his company was in reorganization, and that they couldn't pay the things we asked, that it was impossible, but that he felt that the company would be able to go to a ten cent increase and anything else he would have to wait for a complete report.

Q. Was there any further bargaining on that day?

A. No, I don't think so.

Q. Did you indicate any concessions which you might be willing to make?

A. Every time I talked with him, I always indicated that my mind was open and that I would be willing to meet him half way but that any deal that was consummated was subject to the approval of the shop and that day was probably no exception. I told him if he made us a fair offer, we would take it up and try to get it passed.

Q. Did he try to get you to eliminate any of the fringe demands?

A. He may have said that one or the other was unreasonable. It is very possible. I don't particularly recall it.

Q. At this time, there was pending before the Board, the petition of Local 65?

A. Yes, sir, petition and charges.

Q. Petition filed by Local 65?

A. Yes.

[fol. 91] Q. There were also pending the charges filed by 22045?

A. That is right.

Q. I want to bring you back to the conversation at which Mr. Shipman was present in Mr. Kahn's office. Was any specific amount mentioned at that time and place?

A. No. I never talked money with these people. In my—I must digress; in my first meeting with Maccaferri at Kahn's office, he was very insulting. He called me a racketeer and I finally had to be restrained from practically throwing him out of the window. He was very nasty and very

vituperative. He was the last person in the world I would ever talk money with. As a matter of fact, when we had to take back dues that were owed, I never took it up with him. I always took it up with the personnel man.

Q. Did Shipman make any reference to an amount of money?

A. I don't think so. At one time or another, I don't remember if it was in this situation or somewhere else, when somebody, I think it was Shipman, I am not sure, told me I could get a trip to Florida for a month with all expenses paid and not to worry about it and I told him to forget about it, I wasn't interested in it.

Q. Did Kahn mention any amounts?

A. No. Kahn is a very ethical attorney.

Q. Well, what did Kahn say when it was indicated by Shipman that you could get a trip to Florida?

A. I don't think he said it there. I don't think that was said at this meeting. It was said quite some time before, but Kahn is a very fine and elderly gentleman who has the patience that all the rest of us lacked. He kept preaching patience. He told Maccaferri and I think it was Shipman and whoever else was there, that they had gotten along with me for a couple of years, they had had no trouble there, they hadn't paid anything under the table for that, and they were sure that it would continue that way and they were sure the thing would adjust itself. He kept counseling patience and working the thing out amicably.

Mr. Rotolo: What is the reference to thing?

[fol. 92] The Witness: To work out the situation. If it was up to Kahn, there would never be any other union in the picture.

Trial Examiner Leff: What was the subject of the conference?

The Witness: They asked us if we would get out and let 318 in. As I recall, Kahn sat behind his desk more in the position of a mediator, somebody trying to arrive at something in harmony and to satisfy everybody and when he saw that I wouldn't relinquish jurisdiction to 318, he didn't try to urge it on me. He has been exceptionally fair through this entire situat[redacted]

Q. I shan't neglect to tell him that. Between November 8——

Trial Examiner Leff: Is this a good point to take a recess as far as you are concerned?

Mr. Fitzpatrick: Yes.

Trial Examiner Leff: We will recess for five minutes.

(Recess taken.)

Trial Examiner Leff: The hearing will come to order.

By Mr. Fitzpatrick:

Q. Between the conference with Maccaferri on November 8 and the telephone call you had from Frank Ciccone on November 10, did you have any communication with Maccaferri?

A. I don't think so.

Q. Did you have any indication from him or from any other responsible official or attorney of the company that his attitude expressed on November 8 had changed?

A. No. As a matter of fact, on November 10, I think this payroll list of the temporary layoff was given to either Roberts or Fine in the morning by Zevin who was in charge. The relationship was as is, they called up there and I have this list from Mastro indicating certain people who were [fol. 93] laid off as of the previous day or had quit as of that date. I have that paper here. So there was no change in the status quo.

Mr. Rotolo: There was no indication?

The Witness: None whatever as far as we know.

By Mr. Fitzpatrick:

Q. So that as far as you know of your own knowledge, on that day, or during that time, Maccaferri was willing to deal with you—I am using "you" in the sense of collectively either 22045 or 3127?

Trial Examiner Leff: That was my assumption.

Mr. Rotolo: Was the question framed in the alternative or was it a question as to whether 3127 was to be dealt with?

Trial Examiner Leff: I assume he means Local 22045 or 3127 interchangeably.

By Mr. Fitzpatrick:

Q. 22045 and 3127.

Trial Examiner Leff: That was the sense of the question. Was that the sense of your answer?

The Witness: No, I assumed that Mr. Fitzpatrick meant: was he willing to deal with me as a representative of 3127 which was the way I had been dealing with him during that period, not 22045. That was out.

Trial Examiner Leff: All right.

By Mr. Fitzpatrick:

Q. I notice in Respondents' Exhibit 3 that you have a demand, number 1 "That all employees including working foremen be members of the union".

A. Yes, sir.

[fol. 94] Q. What was the condition with reference to union membership at that time?

A. Well, we supposedly had a union shop. However, every time Mr. Macaferri had an employee whom he felt he wanted to treat differently, whether better or worse than the average union employee, he took him out of the union. He made him a company man. I gave him a title of work foreman. The other employees were very upset by this and they felt he was creating a company Gestapo that they wanted sto[illegible]ed and they wanted every single person in the plant who wasn't in the unit that we represented to become a union member and have the same terms and conditions and privileges and obligations that the others had.

Q. So far as you know, at that time, was there anybody in the plant, in the unit, who was not a working foreman, who was not a member of the union?

A. Yes. I can think of at least four men. I am not quite sure that I know them by name. There was one who was Gerald something, and there were a couple of other men in the shipping and packing department.

Q. They have never become members of 3127 or 22045?

A. No. As a matter of fact, I think one or two of them

had originally been members but they had dropped out at Maccaferri's insistence.

Trial Examiner Leff: The company contract required union membership at the end of 30 days.

The Witness: Yes, it did, but it is difficult to explain this, but Maccaferri felt that he was entitled to company men and that the rest were union men.

By Mr. Fitzpatrick:

Q. These four that you referred to were not working foremen, are they?

A. No. I don't think they were.

Q. They are ordinary run of the mill people?

A. I think at least three of them were. One may have been a working foreman.

[fol. 95-96] Q. Did you ever discuss with Maccaferri the question of these three or four?

A. I took it up with him on occasion. He got pretty excited about it. He yelled that that was his privilege and his prerogative and we weren't going to run his plant and generally in the interest of harmony, I would not make an issue about it. Generally there were 100 people working and I figured we would collect $8.00 a month dues less and keep everybody happy.

Trial Examiner Leff: How many people were there in this plant all together, do you recall?

The Witness: At the time of the lock-out?

Trial Examiner Leff: Yes.

The Witness: 137, approximately. The number in the plant varied from about 80, which was a minimum, to about 190 which was when they were very, very busy working—jammed.

Mr. Fitzpatrick: Off the record.

Trial Examiner Leff: Off the record.

(Discussion held off the record.)

Trial Examiner Leff: On the record.

Mr. Fitzpatrick: No further questions, although I will say I would like the opportunity to call Mr. Saul at a later date.

Mr. Rotolo: Call him as your witness, or for further cross examination?

Trial Examiner Leff: If you have further cross examination you can have it now. You may call him as an adverse witness, if he falls within that definition.

Do you have any further questions of this witness, Mr. Rotolo?

Mr. Rotolo: No, no further questions.

Trial Examiner Leff: All right.

(Witness leaves stand.)

Mr. Rotolo: I will call Rose Amoroso to the stand.

[fol. 97] Rose Amoroso a witness called by and on behalf of the General Counsel, and after being duly sworn, was examined, and testified as follows:

Direct examination.

By Mr. Rotolo:

Q. Miss Amoroso, were you employed by the Mastro Plastics Company during the month of October, 1950?

A. Yes.

Q. And what sort of work did you do in the plant?

A. I am an injection molder. I was.

[fol. 98] Q. Injection molder in the injection molding department?

A. Yes.

Q. And how long had you been working there for this company prior to November 10, 1950?

A. Three and a half years.

Q. Directing your attention to the date October 20, 1950, do you recall having a conversation with the shop steward, Virginia O'Neill?

A. Yes.

Q. Will you tell us what the conversation was?

A. It was Friday, October 20, and Virginia O'Neill spoke to myself, Grace Cincimino, Vernal Gibson and Al Montopoli.

Q. What did she say?

A. She told us Mr. Maccaferri wanted us to help him organize 318, and that on the following day, which was Saturday, we were supposed to meet Mr. Tonelli on Lafayette Street.

Q. Did you agree to go with Miss O'Neill?

A. Yes. She also said if we didn't do as we were told we would jeopardize our jobs and maybe force them in closing the plant.

Q. Did you meet Miss O'Neill the next day with the others?

A. Yes, the following day.

Q. On Saturday, October 21?

A. Yes, made arrangements to meet. I and Vernal Gibson met her at 156th Street, and then we met Al Montopoli and Grace on 116th Street, and we all went to 318 on Lafayette Street.

Q. Now, this group that met on that day, were you all very good friends?

A. Yes, we were very friendly.

Q. And Miss O'Neill was acting during this entire period as shop steward of Local 22045?

A. Yes.

Q. And had you acted with Miss O'Neill in a similar committee of the same persons before?

A. Yes.

[fol. 99] Q. And on what occasion was that prior to that time did the five of you that went anywhere together with Miss O'Neill, the four of you, went with Miss O'Neill?

A. Yes.

Q. When was that?

A. The time-65 was trying to get into Mastro Plastics.

. . . . . .

By Mr. Rotolo:

Q. Now, Miss Amoroso, when I asked you to tell me whether at any time prior to that occasion the five of you had acted together, and you mentioned a Local 65 meeting, please don't tell us in what capacity you were acting; just tell us what happened on this previous occasion. What did you do together?

A. Well, us five, we had to go out and find out the people that were attending 65 meetings.

Q. You went to——

Mr. Fitzpatrick: I object.

Trial Examiner Leff: I will sustain the objection on this ground only: she said the five had to go out and find out something. That is meaningless to me. I want to know——

By Mr. Rotolo:

Q. Tell us what you did. Don't tell us what you had to do or what motivated you——

A. That is what we did.

Q. You went to a meeting of 65?

A. Yes.

Q. And who suggested that you go on that occasion?

A. Virginia O'Neill.

Mr. Fitzpatrick: What is the date of that meeting?

The Witness: I couldn't say, but it was maybe the early part of October.

By Mr. Rotolo:

Q. Did the five of you go to the office of Local 318 on Lafayette Street?

A. Yes.

[fol. 100] Q. And did you see Mr. Tonelli there?

A. Yes, there we met Mr. Tonelli and several other men.

Q. Other persons connected with 318?

A. Yes.

Q. Will you tell us what happened at Local 318?

A. They were telling us all the good they could do for us, and while we were there for a few minutes there was a telephone call for Mr. Tonelli, one of the men said Mr. Maccaferri would like to speak to you, so Mr. Tonelli left and went out in the outer office and received his call.

Mr. Fitzpatrick: Objection.

Mr. Rotolo: She testified as to what happened, Mr. Examiner.

Trial Examiner Leff: I will strike out only that part where the witness stated that Mr. Tonelli went out to the

outer office and received a call. The other things were stated in her presence.

By Mr. Rotolo:

Q. And did Mr. Tonelli give you or anyone in this——

A. Yes.

Q. —group of people with you any cards, Local 318 cards?

A. Yes. He said in order to start the ball rolling on Monday we would have to at least get 75 names, so distributed the cards and gave them to Grace Cincimino, since I refused to take any because I told him I had to think about it.

Q. He asked you to sign a card at that time?

A. He asked me to be one of the first members, and I refused.

Q. Did anyone in that group sign a card at that time?

A. Yes. I think Virginia O'Neill did and Grace Cincimino.

Q. Now, did you go home after that conference with Mr. Tonelli, or did you go back to the plant?

A. No. We went back to the plant in Mr. Maccaferri's office.

[fol. 101] Q. And all five of you were present in the office?

A. Yes, all five.

Q. And what was the conversation, if you recall, between Mr. Tonelli with you or with any other persons in your hearing at that time?

Trial Examiner Leff: Did Mr. Tonelli go to the plant, too?

Mr. Rotolo: No. The five people.

The Witness: We all went back to Mr. Maccaferri's office, and when we arrived he asked us, he said, "What do you think of Mr. Tonelli? Isn't he a fine man?"

So I spoke up and I said to him, "Couldn't you compromise a little bit?"

I said, "There is so much discontentment already without adding any more."

And his reply was, "Listen, Rose, I give everything to 318 and nothing to 22045."

And after that I didn't argue with him and I kept quiet.

By Mr. Rotolo:

Q. Was anything else said or done at that meeting?

A. Yes. After that he took out the payroll and we all went over the names of the people who we thought we could get to join 318, and the people he thought he could get, and he said if the ones that were really in doubt wouldn't join, he would get rid of them.

Q. What was the last statement?

A. We went over the names and he said the people we weren't sure of he would get their names and if they wouldn't sign at all, then they would have to go out, meaning he would fire them.

Q. Did he use the word "fire"?

A. "Out".

Q. He said they would go out?

A. Yes.

[fol. 102] Q. After that was done, what else was said? Did you leave right away from the office?

A. After we went over the names we were all ready to leave, and either he took Grace aside and then he took Virginia O'Neill aside, and then——

Q. Did he talk with them privately?

A. Yes.

Q. You didn't hear what was said?

A. No, I couldn't say.

Q. Did he talk to you in private?

A. Yes. He said to me, "Don't worry, Rose, you won't regret helping me. Everything will be all right."

Q. Did he say anything else about what was to be done on Monday morning?

A. Yes. He gave Grace cards that were supposed to have been distributed amongst us five in order to start the ball rolling, and Grace took them again. Grace Cincimino had cards, and he said we should start the ball rolling on Monday, and that was the conclusion of that meeting.

Q. You didn't take any cards yourself?

A. No.

Q. Were you supposed to work on that Saturday, October 21?

A. No, we weren't supposed to work, but we got time and a half for that particular Saturday.

Q. Were you paid for that day by Mr. Maccaferri?
A. Yes.
Q. You got time and a half for that day?
A. Yes.
Q. Was that a full day's pay?
A. Yes.
Q. And a half?
A. Yes.
Q. What time did you leave the plant; do you remember?
A. I believe it must have been about three o'clock.
Q. When do you usually quit your work when you do work?
A. Four, but we had gone downtown; we had an appointment for eleven.
[fol. 103] Q. What time did you get to the 318 office?
A. We had the appointment for 11:00 o'clock.
Q. And you stayed there at 318 for how long?
A. I would say about an hour and a half at the most.
Q. So what time did you get back to the plant?
A. About 1:30, I believe.
Q. So, altogether, you were in the plant, in Mr. Maccaferri's office, about an hour and a half?
A. Yes.
Q. You received a full day's pay at that time at the time and a half rate?
A. Yes.
Q. On Monday morning did you get any cards from Grace Cincimino and distribute them?
A. No, I didn't.
Q. Did you see Virginia O'Neill distributing any cards during the working hours?
A. Yes, I did.
Q. In your department?
A. She wasn't at her working place all day. She had started the ball rolling.
Q. Does Virginia O'Neill work in your department?
A. Yes.
Q. And she was not at her place of work during that entire morning?
A. No.
Q. Did you hear her talking to any of the employees in your department?

A. Yes.

Q. What was she saying to them?

A. She said, "The boss wants 318", and it would be a good thing if we all cooperated.

Q. And she was giving out the cards?

A. Yes.

Q. Did she get any signature on these cards at that time?

A. Yes.

Q. Did you see Grace Cincimino distributing cards and getting signatures?

A. No, because she is in a different department.

[fol. 104] Q. Did you see anybody else giving cards out that morning?

A. Yes, one of the supervisors, Bill Ritacco.

Trial Examiner Leff: What is he in the plant?

The Witness: Supervisor.

By Mr. Rotolo:

Q. Is he the foreman of your department?

A. Yes, foreman of the first shift, molding department.

Q. Does he do any work?

A. Yes; he is a maintenance—he used to——

Q. Does he do any work like the other employees do?

A. No, no.

Q. Did he give out the orders to the people in that department as to what to do?

A. Yes.

Mr. Rotolo: Any question about Mr. Ritacco's supervisory capacity, Mr. Fitzpatrick?

Mr. Fitzpatrick: I don't think so.

By Mr. Rotolo:

Q. Did you see Ritacco distributing cards and getting them signed?

A. Yes.

Q. Who did he give them to?

A. He gave them to one fellow. I know his name.

Q. After they were signed, or after they were collected?

A. They were supposed to have been given to Virginia.

Q. Who did he give them to; not supposed——

A. I didn't see him.

Q. You didn't see him?

A. That I didn't see.

Q. You say this took place during working hours on the morning of October 23?

A. Yes.

Q. What are your working hours in the molding——

A. From 7:30 to 4:00 o'clock.

Q. And you have a lunch period?

A. Yes.

Q. When is that lunch period?

A. We all have different lunch periods. We all had to alternate.

[fol. 105] Q. Do you have a rest period during the morning?

A. Yes. No. I don't remember. But I know we had one ten minutes of three.

Q. You had no break in the morning, that you recall?

A. Yes, yes.

Q. Ten-minute break?

A. Yes.

Q. Now, this distribution of cards you say you saw by O'Neill or Ritacco, was it during any rest period or during working hours?

A. No, during working hours.

Mr. Fitzpatrick: I object to the form of the question.

Mr. Rotolo: I am trying to find out what time, whether it was continuous or not.

Trial Examiner Leff: Read the question.

(Lines 21 through 23, preceding page, read.)

Mr. Fitzpatrick: There is no testimony there was a joint distribution of cards by Ritacco and O'Neill.

Mr. Rotolo: The intent of the question was in the alternative and not the conjunction.

Trial Examiner Leff: Objection overruled.

When did you observe cards being distributed by Mr. Ritacco?

The Witness: During working hours.

Trial Examiner Leff: How about by Miss O'Neill?

The Witness: Also during working hours.

By Mr. Rotolo:

Q. When Miss O'Neill was distributing these cards in your department, was Mr. Ritacco present?

A. Yes.

Q. Could he see her moving around in the department?

A. Yes.

Q. Distributing the cards?

A. Yes.

[fol. 106] Q. Did he make any objection or did he tell Miss O'Neill about this activity?

A. No, none that I was aware of.

Q. Did you sign a card for Local 318 on that day?

A. No.

Q. You heard Mr. Saul testify there was a meeting of Local 22045 that same night on October 23. Did you attend that meeting, do you remember? That Monday night when cards were distributed, you say.

A. Yes.

Q. And do you recall at that meeting that the members transferred their affiliation?

A. Yes.

Q. To 3127?

A. To 3127, yes.

Q. Were you asked any questions by anyone at this meeting about this trip to Local 318's office?

A. Yes. One; Frank Ciccone insinuated, made certain accusations.

Q. Against you?

A. Yes.

. . . . . .

Q. Were you asked to go to a meeting of Local 318 sometime during that week?

A. Yes.

Q. Did you go to that meeting?

A. No.

Q. Who asked you to go to a meeting of Local 318 members?

A. Virginia O'Neill.

Q. Did she tell you when the meeting was supposed to be held?

A. You see, she knew that—am I allowed to express myself?

Q. Just tell us what she said at that time as to when the meeting was supposed to be held.

A. When I said "no", that was enough, because she knew I wanted no part of it.

Q. Do you recall during the period prior to November 10, 1950, Friday, November 10, did you see Frank Ciccone distributing cards for 3127?

A. No.

[fol. 107] Q. Didn't see him?

A. No.

Q. Were you asked to sign a membership card in 3127?

A. Yes, we did.

Q. When was that?

A. At one of the meetings, October 25. October 25, I believe, or the 23rd. Either one. I am not sure.

Q. You mean that Monday night meeting?

A. Yes.

Q. Did you sign a card at that time?

A. Yes.

. . . . . .

By Mr. Rotolo:

Q. Directing your attention to the date of November 10, Friday, November 10, 1950, do you recall anything unusual happening in the plant in your department shortly after 3:30 o'clock that afternoon?

A. Yes.

Q. Will you tell us what happened?

A. We all heard about Frank Ciccone being fired.

Q. How did you hear that?

A. Through Virginia O'Neill, and I asked "Why don't you do something; you are shop steward?"

And she laughed. She said she didn't want to do anything.

Later on, Vern—and this was almost quitting time because we went in for the last half hour, we would have gone to a different department, the packing department, to work——

Q. In other words, you were in the molding room until 3:30; is that right?

A. Yes.

Q. And then a new shift would come in the molding room; is that right?

A. Yes.

Q. And your shift then would move over to the packing department?

A. Yes.

Q. All right. Tell us the rest of that.

A. So by that time, it was close to quitting time, and I, [fol. 108] myself, and Vernal Gibson went over to the supervisor, Bill Ritacco, and we asked him what happened to Frank, so he said, "Frank was fired because of 3127, and anybody else who intended to join with 3127 would get the same treatment, that they would be fired."

* * * * * * *

By Mr. Rotolo:

Q. Did you finish your work in the other department that afternoon in the packing department or had you punched out before quitting time?

A. We finished, because it was close to four o'clock.

Q. When you went out of the plant did you see Frank Ciccone and some of the other employees out in front of the plant?

A. Yes.

Q. Do you remember whether Mr. Saul arrived at the scene shortly after that?

A. Yes.

Q. Did you engage in picketing there which started on that day?

A. Yes.

Q. During this entire picketing period which continued during November and December, did you engage in picketing activities?

A. Yes.

Q. Do you recall, Miss Amoroso, whether you received a letter similar to the letter which is now in evidence as General Counsel's Exhibit 7? Did you get a letter like this about December 12, 1950, discharging you?

A. Yes.

Q. Did you have any conversations with Mr. Maccaferri while you were in front of the plant, or did you hear him make any statements to any people while you were on the picket line?

A. No.

Q. You authorized Mr. Saul to ask Mr. Maccaferri to reinstate you or have you returned to work sometime in February or March?

A. Yes.

* * * * * * *

[fol. 109] Cross-examination.

By Mr. Fitzpatrick:

Q. Now, Miss Amoroso, I want you to go back to your testimony concerning the distribution of cards on October 23 in the plant. You say you saw Mr. Ritacco distributing cards?

A. Yes.

Q. At what time was it?

A. As soon as we began to work. I would say about nine o'clock when I saw him.

Q. That isn't clear to me. You say you start to work at 7:30, and that it was not until nine o'clock that he distributed the cards?

A. Yes, about nine o'clock.

Trial Examiner Leff: Who is this we are talking about?

Mr. Fitzpatrick: Ritacco.

By Mr. Fitzpatrick:

Q. You used the phrase "as soon as we started to work."

A. I am sorry. Then it is not as soon as we started to work, but a while after.

Q. I want to be sure about that.

A. Yes.

Q. It was after you started to work?

A. Yes.

Q. He is the foreman of the molders?

A. Yes, my shift.

Q. To how many people did he distribute cards?
A. I saw him only one.
Q. Who was that one?
A. Louis Castaldo.
Q. Did you hear what he said to Castaldo?
A. He asked him would he please sign the card. That is all I heard.
Q. Where were you standing when you heard that?
A. I would say as close as I am to the Examiner.

Trial Examiner Leff: About two or three feet.

By Mr. Fitzpatrick:

Q. Mr. Ritacco have any other cards in his hands at the time?
A. Yes.

* * * * * * *

[fol. 110] Q. Did you hear any other part of the conversation except the phrase "Will you please sign this card?"?
A. No.
Q. What did Mr. Castaldo say?
A. He signed the card and handed it back to Mr. Ritacco.
Q. He didn't say anything?
A. No.
Q. Did you see the card?
A. No, but—no.
Q. You don't know what was on it?
A. You mean with his signature or the card being distributed by 318?
Q. Did you see it? Did you see the card which Mr. Ritacco handed to Mr. Castaldo?
A. Yes. It was a card of 318.

* * * * * * *

Q. Who else signed 3127 cards as far as you know?
A. I would say there were about 90 people at that meeting.
Q. And how many signed 3127 cards?
A. We all did at that meeting. We renounced 22045 because of the welfare fund.

Q. Did you execute any renunciation of 22045?

A. Please explain that.

Q. Well, when you repudiated 65 you signed a document which said you repudiate 65. Is that so?

A. Yes.

Mr. Rotolo: I object. There is no testimony this witness ever joined 65. I think the question is irrelevant.

Mr. Fitzpatrick: I am just explaining my question to her.

Mr. Rotolo: I know, but the witness didn't say she joined 65.

Trial Examiner Leff: Did you sign any paper saying that you were leaving 22045?

The Witness: Yes, because of the welfare fund.

[fol. 111] Trial Examiner Leff: You said you signed cards for 3127 and at the same time did you sign some other paper to show you wanted to get out?

The Witness: Yes, we renounced 22045.

By Mr. Fitzpatrick:

Q. What was that paper like—a big paper, or was it an individual card?

A. No. It was a sheet of paper. I don't see anything around that looks like it.

Q. That was at the meeting of the 23rd?

A. Yes.

Q. Were you a member of the committee at any time?

A. Yes.

Q. The original committee?

A. No.

Q. The enlarged committee?

A. Yes.

Q. That was a committee that was appointed at the meeting of the 23rd?

A. Yes.

* * * * * * *

STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF MARCH 5, 1952.

. . . . . .

PROCEEDINGS

Trial Examiner Leff: We will be in order.

Miss Amoroso, will you please take the stand?

ROSE AMOROSO, a witness called by and on behalf of the General Counsel, resumed the stand and testified further as follows:

. . . . . .

Redirect examination.

By Mr. Rotolo:

Q. When you left the plant, Miss Amoroso, on November 10, there was some discussion outside amongst the em- [fol. 112] ployees that were outside the plant about what had happened in the plant; is that right?

A. Yes.

Q. Was any mention made of Local 318 at that time?

A. Yes, a few of the workers were discussing about 318.

Q. What were they saying about it?

A. They were saying that the boss had gone around during that day to ask a few of the workers to sign cards, application cards from 318.

. . . . . .

By Mr. Rotolo:

Q. What did the employees say about that action, the action of the company or company representatives in getting these 318 cards signed. What was the discussion about?

A. Well, they felt that the boss had no right to influence the minds of the workers.

Q. Did you see any of the employees from the tool room out there other than Frank Ciecone?

A. Yes.

Q. Did you talk to him?

A. Yes.

Q. Did he tell you what had happened in the tool room that afternoon?

A. Yes.

Q. Was that discussed amongst the employees that were present?

A. Yes, there was a group of people.

. . . . . .

[fol. 113] VERNAL GIBSON FINE, a witness called by and on behalf of the General Counsel, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your name?

The Witness: Vernal Gibson Fine.

Trial Examiner Leff: And your address?

The Witness: 619 East 182nd Street, Bronx, New York.

Direct examination.

By Mr. Rotolo:

Q. Mrs. Fine, were you employed by Mastro Plastics Company up until the period prior to November 10, 1950?

A. Yes, I was.

Q. And how long had you been working with that company before that time?

A. Three and a half years.

Q. In what department?

A. Molding room.

Q. Who was your supervisor at that time?

A. William Ritacco.

Q. Now, at that time you were known as Vernal Gibson; is that right?

A. That is right.

Q. You weren't married at that time?

A. No.

Q. Were you a friend of another employee that worked in that department by the name of Virginia O'Neill?

A. Yes, I was.

Q. Would you say you were very friendly?

A. Yes.

Q. And you were also a close friend of Rose Amoroso here?

A. Yes.

Q. And Grace Cincimino?

A. Yes, and Al Montopoli.

Q. Was Al Montopoli Grace Cincimino's husband?

A. Yes.

Q. She didn't use her married name in the plant?

A. No, she didn't use her marriage name in the plant.

[fol. 114] Trial Examiner Leff: What is that name again?

Mr. Rotolo: Grace Cincimino, C-i-n-c-i-m-i-n-o.

By Mr. Rotolo:

Q. This group of five employees, including yourself, acted closely together in your work or in your affairs in the plant?

A. Yes.

. . . . . .

Q. Directing your attention to the date Friday, October 20, did you have a conversation with Miss O'Neill at that time about attending another union meeting?

A. Yes.

Q. Tell us what she said at that time?

A. Well, she came over to me and she said that Mr. Maccaferri wanted us to go down to the 318 union, and I asked her why, and she said that she coulda't tell me then, but the previous morning that she would explain everything.

Q. Previous morning?

A. The next morning.

I left her then, went home that evening. The next morning I met her at 156th Street, Rose and myself.

Q. Rose Amoroso?

A. Rose Amoroso.

Q. Who else met you that morning?

A. I met Virginia at 156th Street. From there, at 116th Street, I met Grace Cincimino and Al Montopoli. Nothing was said going down, but she took us to the 318 union at 225

Lafayette Street, and she said we had a meeting there at 11:00 o'clock, we had to be there at this place.

Q. When you got to the 318 office, who did you see there first?

A. I met a man by the name of Joseph Tonelli.

Q. The whole group?

A. Joseph Tonelli was there then, but as we sat down there about five or ten minutes after, these gentlemen walked in, these four or five men.

Q. Do you remember who they were?

A. Not offhand their names.

[fol. 115] Q. Do you remember a man by the name of Fogelman?

A. Charley Fogelman.

Q. All five of you were in Mr. Tonelli's private office; is that right?

A. That is right.

Q. And you had some discussions with Mr. Tonelli?

A. Yes.

. . . . . .

Q. What else happened at that meeting?

A. Mr. Tonelli came out with a bunch of cards and he wanted us to sign. Rose Amoroso and myself refused to sign those cards, that we wanted to think it over. And Grace Cincimino took the bunch of cards from Mr. Tonelli and Virginia O'Neill signed a card, and so did Grace. Then we left the office a little after that.

Q. What time did you leave the office?

A. I would say about 1:30, a quarter to two.

Q. You were there from 11:00 o'clock until 1:30?

A. Yes.

Q. Where did you go after you left the 318 office?

A. After that I said to—Rose and myself said to the other girls that we didn't like the way things were and we wanted to speak to the boss. So we decided we would go back that same day to Mastro Plastics and speak to Mr. Maccaferri.

Q. Did you go back to the plant at that time that day?

A. Yes, we did.

Q. Were you supposed to work on that day?

A. No, I was not supposed to work on that day.

Q. You sometimes work on Saturday?

A. Yes.

Q. And how did you know whether you were supposed to work on Saturday or not?

A. They always told us the day before whether you were supposed to work Saturday.

Q. And had you received any instructions on Friday to report for work on that Saturday?

A. I asked Mr. Zebie if I was supposed to work and he [fol. 116] said no. A few minutes later, as I had my coat on, I asked him again, and he said no. This is how I know I wasn't supposed to work that Saturday.

Q. Did you and the others go to Mr. Maccaferri's office when you reached the plant?

A. Yes, we did.

Q. And what was the conversation that you of the others, in your presence, had with Mr. Maccaferri?

Trial Examiner Leff: What date is this?

Mr. Rotolo: October 21, Saturday.

The Witness: Well, when we arrived at the office Mr. Maccaferri came in and we sat down, and he asked us if we had cards, and we said yes. Grace handed him the cards. She told him 75 cards had to be signed Monday morning early.

Later on he took out the payroll slip and he asked us to

Q. A slip, was it?

A. A payroll, a slip with all the names of the people working in the plant. He asked us who do we think would sign these cards.

Later on I said to him, "Well, suppose some of them don't sign?

He said, "Well, if they don't sign they know where the door is; they can get out."

Q. Did he distribute any of these cards to each of you, or what did he do with the cards after?

A. He didn't give me no cards. I didn't take no cards.

Q. Who took the cards?

A. Virginia O'Neill took the cards and Grace Cincimino. I didn't take any.

Q. Did you hear Mr. Maccaferri say anything at the time he gave the cards to Grace Cincimino and Virginia O'Neill?

[fol. 117] Mr. Fitzpatrick: I object to that. There is no testimony Mr. Maccaferri gave cards to anyone.

Mr. Rotolo: She just testified he gave cards to Virginia O'Neill and Grace Cincimino.

Trial Examiner Leff: I don't think that was her testimony. I think she testified Mr. Maccaferri asked if they had cards.

Mr. Rotolo: She testified that he asked for the cards, and——

By Mr. Rotolo:

Q. Were the cards given to him?

A. The cards were given to him by Grace Cincimino.

Trial Examiner Leff: The cards received from Mr. Tonelli?

The Witness: Yes.

Trial Examiner Leff: I will overrule the objection.

By Mr. Rotolo:

Q. When he gave the cards back to Virginia O'Neill and to Grace Cincimino, what did he say?

A. He told them, "Take the cards," and to be in Monday morning early, and that the ball would roll on Monday morning.

Q. He used the words "the ball would roll Monday morning"?

A. That's right.

Q. Did you have any conversations with Mr. Maccaferri, apart from the group that was there in his office, privately?

A. I didn't have no words with him, but he called Virginia O'Neill aside and spoke to her.

Trial Examiner Leff: In your presence?

The Witness: In my presence, and he called Grace Cincimino aside. I didn't hear what they said, but as we were walking out he called Rose over, he said to her not to worry about anything, that she won't regret anything, and that's all I heard.

[fol. 118] By Mr. Rotolo:

Q. You heard that, did you?

A. Yes, I did.

Q. And had you had your lunch at that time?

A. No, I didn't have my lunch. He offered to take us to lunch, but we refused. He said he would call up a place for us to go to eat, but he could not attend it because he had somewhere to go, and we refused the lunch and we went home.

Q. Now, did he mention Mr. Tonelli at that conference? Did Mr. Maccaferri mention him?

A. Yes. Rose asked Mr. Maccaferri if he could compromise, and he turned around and he said to her, "I will give nothing to 22045, but I will give everything to Mr. Tonelli."

Q. When he talked to the group in his office did he say anything about Miss O'Neill?

A. Just I know he told her to come in Monday morning early to start the ball——

Q. I see.

Now, were you paid for that day, Mrs. Fine?

A. The following day I was paid for that Saturday time and a half.

Q. Time and a half for eight hours?

A. Yes.

Q. How much time did you actually spend in the plant with Mr. Maccaferri?

A. That Saturday?

Q. That Saturday.

A. Oh, I would say about three o'clock; from the time I got there—about 3:00 or 3:30, it was.

Q. And what time were you supposed to report for work on a Saturday when you do go in?

A. 7:30, 7:30 to 4:00.

Trial Examiner Leff: You were there from 3:30 to when?

The Witness: I would say about four o'clock.

Trial Examiner Leff: Probably a half hour?

The Witness: About a half hour.

[fol. 119] Trial Examiner Leff: And what did you get pay for?

Mr. Rotolo: I think she testified she got there three o'clock.

The Witness: It was therce o'clock when I got there, it was around three o'clock, because they were still working in the plant.

Trial Examiner Leff: How many hours were you paid for at the rate of time and a half, do you recall?

The Witness: The whole day.

By Mr. Rotolo:

Q. You reported for work on Monday morning as usual?

A. Yes.

Q. Did you see Miss O'Neill at the plant that morning?

A. Oh, yes.

Q. Did you see Grace Cincimino?

A. I saw Grace Cincimino and Al Montopoli.

Q. Did she give you any of the 318 cards?

A. No.

Q. Did you ask for them?

A. No.

Q. Did you sign any 318 card at that time?

A. No.

Q. Had you determined not to do any of this union activities that Mr. Maccaferri suggested?

A. That is right.

Mr. Fitzpatrick: I object to the form of the question.

Mr. Rotolo: I will withdraw the question.

Trial Examiner Leff: All right.

By Mr. Rotolo:

Q. What decision did you make between Saturday and Monday as to what Mr. Maccaferri had said on Saturday?

A. I decided I didn't want to have nothing to do with it, I didn't want to give out no cards. I just didn't want to be bothered with it.

Q. Now, Miss O'Neill works in your department; is that right?

A. That is right.

[fol. 120] Q. Where does Grace Cincimino work?

A. She works in the molding room, too but at that time Virginia O'Neill was running around the plant that morning so I didn't know where they set her up that morning.

Q. But usually Miss O'Neill and Miss Cincimino work in the same room with you?

A. That is right.

Q. Did you see them in the molding room working that morning?

A. No, they were not working.

Q. Did you see them in the plant?

A. They were in the plant.

Q. What did you see Miss O'Neill doing?

A. She was giving out cards to the people and telling them to sign them.

Q. Did you see the cards she handed out?

A. Yes.

Q. Were they the same cards that Mr. Tonelli had given to Grace Cincimino on Saturday?

Mr. Fitzpatrick: Objection. There is no testimony that Mr. Tonelli——

Mr. Rotolo: I withdraw the question.

By Mr. Rotolo:

Q. Did you recognize the cards which Miss O'Neill was giving out on Monday?

A. Yes.

Q. What kind were they?

A. 318 cards.

Q. Did you hear Mis O'Neill say anything when she was giving out cards?

A. Yes. She told them to sign the cards; that it was a good union, and they had so much to offer, and people were bewildered because they didn't know what to do. So from then on I left her. I didn't stay to hear any more.

Q. This was in the molding room?

A. That is right.

Q. How many employees did you see her approach and talk to?

A. I would say about five or ten people.

Q. Now, at the time Miss O'Neill was in the molding [fol. 121] room with these cards, did you see Mr. Ritacco, the foreman, in that room?

A. Yes.

Q. What was he doing there?

A. He was making one of the workers sign a card, 318 card.

Mr. Fitzpatrick: I ask that answer be stricken.

Trial Examiner Leff: Will you read the question and answer?

(Lines 17 and 18, this page, read.)

Trial Examiner Leff: I will strike the answer because of its form.

By Mr. Rotolo:

Q. Tell us, did you hear Mr. Ritacco say anything?

A. He went over to a fellow—his name in Louis Castaldo, or something—and he told him to sign this 318 card, and he handed him a pencil with the card.

Mr. Fitzpatrick: Objection to the form of the answer. If she would state what she heard him say.

Trial Examiner Leff: What did you hear Ritacco saying?

The Witness: He told him to sign this 318 card, and he handed him a pencil.

Trial Examiner Leff: Who was the employee? What is his name, do you know?

The Witness: Louis Castaldo.

By Mr. Rotolo:

Q. Did you see him talking to any other employee in that room with cards in his hand?

A. Well, he was walking around the plant, but where I was, I could see just him talking to Louis Castaldo; that's where my machine was.

Q. From where you were sitting could you see Virginia O'Neill going around?

A. Yes.

Q. Would you explain why you could see Miss O'Neill talking to the others and you saw Mr. Ritacco only talking to Castaldo?

A. Well, I was working what you call a foot press [fol. 122] machine. I don't operate an automatic. It is by foot. I can get up from where I am sitting and where I am sitting to where the time clock is, that is where I saw

Virginia and the next machine next to me was Louis Castaldo, and from there on I cannot see down the back.

Q. Where did you see Virginia O'Neill talking to the employees?

A. Right next to my machine, as close as he is to me.

Trial Examiner Leff: About three feet.

By Mr. Rotolo:

Q. About three feet away from you?

A. That is right.

Q. This was all during the working hours; is that right?

A. That is right.

Q. What time of morning would you say it was this happened?

A. Well, at the time when I saw Virginia it was about a quarter to nine—nine o'clock.

Q. How about Ritacco, when you saw him?

A. About the same time when I saw Ritacco.

Q. Did you have a rest period during that morning?

A. Yes, I had a rest period. It was around ten o'clock, I would say.

Q. Did you see Virginia O'Neill during the rest period?

A. Yes. I was in the ladies' room with her and she came in and she said, "I have cards signed" and she had a stack of 318 cards in her hand.

Q. Did you say anything to her at that time?

A. No, not that I remember saying anything.

Q. You were still friendly with Miss O'Neill at that time?

A. Yes.

Q. Do you recall in the latter part of that same day going in to Mr. Maccaferri's office with Miss O'Neill?

A. Yes, I do.

[fol. 123] Q. How did you come to go into his office? Did he call you?

A. No, he didn't call me. He called Virginia. But Virginia asked me if I would go with her. We walked into the office, and it was one of his side offices.

Q. Did Mr. Maccaferri object to your coming in with Miss O'Neill?

A. No, he didn't. He seemed very pleased. When I

was inside the office he was talking to Virginia, saying what a good job she did, and he patted her on her back.

I asked him where did he ever get this 318 union. He said he found, he had a little card in his safe with this 318 union, the name card, and he said he just happened to open his safe and he saw it.

Q. Was anything said by Miss O'Neill?

A. He turned around and he told Virginia that she didn't have to worry, that some day he would take her to Florida, or something like that.

Q. Did he mention at that time Local 22045 that you recall?

A. In the office you mean that day?

Q. Yes, that afternoon,

A. Yes, he said that he would give everything to 318 and nothing to 22045 at the time.

Mr. Fitzpatrick: This is on the 23rd?

Mr. Rotolo: 21st. Yes, 23rd you are right.

The Witness: The Monday.

Mr. Fitzpatrick: That is the same remark he made on the 21st?

The Witness: That is right.

By Mr. Rotolo:

Q. Did he explain, or give any reason, for that, if you recall?

A. Not that I know of.

Trial Examiner Leff: We will take a five minute recess.

(Recess taken.)

[fol. 124] By Mr. Rotolo:

Q. Mrs. Fine, when we recessed before, you told us about this conversation you had with Mr. Maccaferri in his office with Virginia O'Neill present in the afternoon of Monday, October 23?

A. Yes.

Q. That was the last thing you talked about?

A. Yes.

Q. I am going to direct your attention to the night of

that day, October 23. Did you attend a meeting on that night of a Local 22045 committee?

A. Yes, I did.

Q. Was Miss O'Neill present at that meeting?

A. Yes, but she walked out, I think.

Mr. Fitzpatrick: May I inquire? As I recall the testimony, it has been to the effect that that was a general meeting of 22045, not a committee meeting.

By Mr. Rotolo:

Q. Was it a committee meeting or a general meeting that night on Monday, October 23?

A. I am not too sure whether it was a committee meeting or just a regular meeting.

Q. How many people were present? Were there a large number of employees at the Bedford Park Restaurant?

A. Yes.

Q. Mr. Saul has testified that there was a general meeting October 23.

A. Yes.

Q. He also testified that on that night the employees voted to transfer their affiliation of 3127, do you recall that?

A. That is right.

* * * * * * *

Q. Directing your attention to November 10, the day of the work stoppage, do you remember in the afternoon of November 10, about 3:00 o'clock, or shortly after three o'clock, something unusual happened in your department?

A. Yes.

Q. Tell us what happened.

A. I heard of a lot of commotion, but I didn't know what [fol. 125] it was about until 3:30 when I went into the packing room.

Q. Yes.

A. And when I went inside I sat down next to Virginia and I asked her what happened. She told me Frank Ciccone was fired. I asked her why and she said for union activities. I said why don't you do something about it, you

are the chair-lady. She laughed at me and didn't say no more.

Q. Did any of the other girls ask any questions of Miss O'Neill about what had happened?

A. Rose Amoroso asked her, too.

Q. Did you have any conversation with the foreman, Mr. Ritacco that same afternoon about what happened in the tool room?

A. Yes, I did. Rose and I were going home. We had our clothing on. Bill was standing near the time clock. We went over to him. We asked him: "Why was Frank fired?" He said because of union activities. If nobody went along with the 318, he said, they can get out, too.

* * * * * * *

Q. Was Local 3127 mentioned during this conversation?

A. Yes, he said about Frank with 3127 cards, if he didn't go along with 318, something like that they could get fired, they could all go out and get fired.

Q. After you left the plant, what did you do?

A. After I left the plant, I walked back into the packing room and I was standing near the side entrance, there is a side entrance near the packing room. Mrs. Maccaferri was there. I asked her if she saw Virginia. She said she didn't know where she was. She was talking about the 318 union, she said if they didn't like it, they could all go out; her husband wanted 318. In the meantime, I left there, looking for Virginia and I saw Virginia going into Mr. Maccaferri's office.

[fol. 126] Q. Did you wait for her?

A. Yes. Virginia O'Neill and myself and Rose Amoroso walked outside to the street.

Q. She didn't say what happened in Mr. Maccaferri's office?

A. No.

Q. When you got outside the plant, what did you do?

Trial Examiner Leff: Before we go on can we get a stipulation as to what Mrs. Maccaferri's position is in the plant?

Mr. Rotolo: I understand she was working in the plant in charge of the packing department.

Mr. Fitzpatrick: I will concede that she is the supervisor.

By Mr. Rotolo:

Q. What happened after you left the plant? Who did you see outside of the plant?

A. I saw Frank outside and Peter Pieroni and Carl Libutti and a couple of other fellows, some people from the assembly room.

Q. These three men you mentioned, Ciccone, Pierone and Libutti, they are all men from the machine shop?

A. Yes. Rose and I was all outside. I didn't take notes who else was outside. I know there was quite a few. We went to the candy store.

Q. Was there any discussion between the employees you mentioned about what happened in the plant that date?

A. No.

Q. Nothing was said?

A. All they said was Frank was fired for union activities and they didn't know why and that is when I went across to the candy store.

Q. Wasn't Local 318 mentioned?

A. Yes, they mentioned about 318.

Q. What was said?

A. They just said they didn't want the 318 union and Frank was fired because of union activities and that they [fol. 127] couldn't see why, that is all I remember right now.

* * * * * * *

Peter Pieroni a witness called by and on behalf of the General Counsel, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your full name?

The Witness: Peter Pieroni.

Trial Examiner Leff: And your address?

The Witness: 1950 Fowler Avenue, Bronx, New York.

Direct examination,

By Mr. Rotolo:

Q. Mr. Pieroni, were you employed by the Mastro Plastics Corporation on and prior to November 10, 1950?

A. Yes, for about three years before then.
Q. What work did you do for that company?
A. I was a tool and mold maker.
Q. Tool and mold maker?
A. Mold dies, yes.
Q. Where did you work; in what department?
A. In the machine shop, the tool room.

. . . . . .

By Mr. Rotolo:

Q. Do you remember there was a meeting of your Local 22045 on a Friday, October 20, 1950, about formulating new demands on the renewal of the contract?
A. Yes, I do.
Q. And were you here when Mr. Saul testified about that meeting?
A. No, I wasn't.
Q. Do you recall generally what took place at that meeting?
A. We presented to the union representatives our [fol. 128] demand for a new contract, what we would like to have. I don't recall the specific demands.
Q. Was it decided at that meeting to ask for a welfare clause in the contract?
A. That was one of the things we did want, because we had welfare plan originally under 3127, but when we switched over to 22045 we didn't have the welfare plan, and we wanted that.
Q. Now, after that meeting, the Monday after that meeting, which was October 23, 1950, did you go to work?
A. Yes, I did.
Q. Before I come to that, prior to that meeting of October 20, 1950, had you heard of any activities around the plant by agents or persons soliciting membership for Local 318 of the Pulp and Sulphite Workers?
A. No, I did not.
Q. Now, again directing your attention to October 23—that is the Monday following that meeting—did you have a conversation with Mr. Maccaferri on Monday morning when you went to work on that day?
A. Yes, I did.

Q. October 23?

A. Yes. That was the first time I heard about 318. Mr. Maccaferri——

Q. What was the conversation? What did he say to you and what did you say to him?

A. He came into the machine shop about 8:35. I hadn't even unpacked my tools. He told me to come in his office.

When we got in there he was telling me about this new union 318, and he told me that this is the union he wanted, this is the union he would work for. And he told me he was going to give me some cards and he wanted me to get the people to sign them, so I told him, "Suppose they wouldn't sign them?"

He said they would have to sign; if they didn't sign they would be out.

[fol. 129] And he gave me something like forty cards, approximately.

And I stayed in his office close to an hour. Then I went into the machine shop.

Q. You were in there an hour?

A. Close to it. Not exactly, but almost.

Then I went in the machine shop and I was talking to the boys in there about signing these 318 cards. When Mr. Maccaferri came in and saw us all standing around—they were listening to me—he told them to sign it, sign these cards. Then I gave the cards out; they signed them and gave them back to me.

Q. In the tool room?

A. That is right.

Then I started to go into the rest of the plant, and Mr. Maccaferri walked out with me.

Q. Before you go on, did you see at that time an employee in that vicinity, in the tool room, by the name of Nino Albini?

A. Yes. As we were walking out Nino was coming in the machine shop. He was never a union member, in any of the unions, but I stopped him.

Q. Was he an hourly-paid worker, or piece worker?

A. I don't know how he was paid. I am pretty sure he was on salary, though.

Q. Do you know whether salaried employees were included in the contract with the union?

A. Those in the contract?

Q. Were the salaried employees supposed to be covered by the union contract?

A. I don't think so, no.

I told Nino to sign one of these cards, and he didn't look at me or say anything. He just asked Mr. Maccaferri if he had to sign it, and Mr. Maccaferri said "Yes, sign it." [fol. 130] Then from then on I went around to the other departments in the building and in other parts of the plant and got other people to sign them. I would say altogether I got about twenty signatures.

Q. While you were there—was this during working hours?

A. Yes, this is the same morning. I explained to the people what the score was as far as I understood it, and I got about twenty signatures. I gave the signed cards to Virginia, which Mr. Maccaferri told me to do.

Q. Virginia who?

Q. Virginia O'Neill.

Q. Why did you give them to her?

A. He told me, Mr. Maccaferri told me to give her the signed cards, and I gave him the blank cards. That took all morning.

Q. Did you usually go around the plant like that, or do you spend your time in the machine shop?

A. Only occasionally. Very rarely did I have to go any more than that.

Q. Do you do maintenance work, fix machines?

A. If it is an emergency repair.

Q. Not as a regular proposition?

A. No.

Q. Did you do any of your regular work on that morning?

A. Not that morning.

Q. October 23?

A. I did not.

Q. You say you spent your time going around the plant; is that right?

A. That is right. I was talking to different people.

Q. How many cards did you get signed?

A. About twenty. I am not sure of the number.

Q. Did you give any of these cards to Frank Ciccone?

A. Yes, I gave him a few. After I had gotten him to sign one, then I gave him some to go around and get them signed.

[fol. 131] Q. Did he help you get signatures?

A. He got a few of them, yes.

Q. Did you see Virginia O'Neill in any part of the plant that morning with cards for 318, similar to the cards that you had?

A. I saw she had 318 cards when I gave her the ones that I had signed. She put them with others that were in her possession, and I saw one, the top one, was signed.

Q. When you were going around the plant you didn't see her?

A. I saw her, but I didn't notice what she was doing.

Q. What departments do you recall you went through? Did you go through the packing department?

A. Well, they had a lot of fancy names.

Q. Where Mrs. Maccaferri was the supervisor?

A. Packing or assembly.

Q. Did you give out cards there?

A. Yes, I did, to girls assembling clothes pins.

Q. Did you give any out in the molding department?

A. I believe I gave a few out in the molding department.

Q. Did Ciccone bring back any cards to you signed?

A. Yes, he gave me some which I turned over to Virginia O'Neill.

Q. When you first got the cards signed, did you give them directly to Virginia that morning, or did you bring them somewhere else?

A. I tried to give them back to Mr. Maccaferri, but he told me that he is not allowed to handle these cards, so he told me to give them to Virginia.

Q. Now, do you recall that there was a meeting of your union held that night, that same night of October 23?

A. Yes.

Q. Do you remember at that meeting any vote was taken to transfer the employees to 3127? Was it there at that [fol. 132] meeting?

A. Yes, I am quite sure that was the meeting we had

at the Bedford Park Restaurant and we decided to shift from 22045 to 3127.

Q. Now, do you recall any discussion at that meeting about what had been taking place in the plant during the day concerning the distribution of 318 cards?

A. I think we told Mr. Saul or Mr. Rothenberg about it, and we asked him—I don't know which one it was—what we could do about it, because we had signed with 318.

Q. Did you inform the officers of your union that you had been asked by Mr. Maccaferri to distribute cards?

A. I told him, yes. I wasn't asked—I was told—to distribute them. I think they mentioned something about we can withdraw from 318 by signing a withdrawal notice or something.

Q. Did you subsequently —

Withdraw that.

Do you know whether subsequently such a withdrawal form was signed by you and other employees who had signed 318 cards?

A. Yes.

Q. Did that take place at that meeting or subsequently?

A. I believe it was at a subsequent meeting.

. . . . . .

Q. In this period, the week following the October 23 meeting, do you know whether any more cards were signed for 3127 either in the plant or outside the plant?

A. Well, I saw Frank getting signatures for 3127 in the candy store, this luncheonette, during our lunch period. I saw him in there. I don't recall how many signatures he got. I would say I saw about three or four, anyhow. [fol. 133] Q. When was this in relation to the time that the employees went out on November 10, how many days before, would you say, or weeks before?

A. About a week before.

Q. And on this occasion when you saw Frank giving out cards in the luncheonette, did you see anybody connected with the company there?

A. Foreman, our foreman Max Studli ate in there quite often. He was in there at the time because during this period of time he was in there pretty often. I am sure I

saw him there, and also a lot of the office help ate there. Mr. Zevin was one of them.

Q. The personnel manager?

A. Yes.

Mr. Fitzpatrick: Is it the witness' testimony that Zevin was present at this time?

The Witness: Yes.

By Mr. Rotolo:

Q. Now, directing your attention to Friday, November 10, 1950, about 1:00 o'clock in the afternoon did you see Mr. Maccaferri in the tool room at that time?

A. Yes.

Trial Examiner Leff: Will you read the question?

(Lines 7 through 9, this page, read.)

By Mr. Rotolo:

Q. About one o'clock on November 10?

A. I think it was a little after one.

He was talking to Frank, and I overheard him saying, "I don't want you going around the rest of the plant; I want you to stay in the machine shop."

And Frank explained to him that his work required him to go around to other parts of the plant.

And Mr. Maccaferri accused him of interfering with the people getting them to sign with 3127, and that Frank [fol. 134] should leave the people alone and let them make up their own mind what to do.

Q. And did Frank remain in the tool room after that when Mr. Maccaferri——

A. He did up until the time we had our break.

Q. When does your break come?

A. Three o'clock.

Q. For how long is it?

A. Ten minutes.

Q. Is that ten minutes to three, or at 3:10; which is it?

A. From 3:00 to ten after three.

At that time Frank and Carl and I went to the molding room where the Coke machine was. We went to get a Coke.

Q. You are sure that is not before three o'clock, your break period?

A. Yes, it is, from ten to three to three o'clock: that is right.

Q. During that break did you go anywhere during that time?

A. Yes, I went into the molding room where the Coke machine was.

Q. Who was with you?

A. Frank Ciccone and Carl Libutti.

Q. Were there any other employees who had gone along from the tool room?

A. Not with us, unless they——.

Q. There were other employees around the Coke machine at the time?

A. Oh, yes.

Q. How long did you stay in the molding room?

A. How long? A few minutes. We just got our Coke and left.

Q. Did you get back to the tool room before your rest period was up?

A. Yes, we did.

Q. Tell us what you heard and saw in the tool room as soon as you got there from the Coke machine?

A. As soon as we got in, Max Studli——

[fol. 135] Q. Tell us who Max Studli is.

A. He is our foreman in the machine shop.

Mr. Rotolo: Any question on that?

Mr. Fitzpatrick: It is conceded Max Studli is a foreman.

The Witness: And he told Frank that he just received a phone call from Mr. Maccaferri and that he had to fire Frank, which he did. He told him, "You're discharged."

Frank asked him why.

And Max said, "Well, I believe it is because of union activity."

And then that was all. He wouldn't talk to Frank any more about it.

Q. What did Frank do? Did he stay there?

A. I don't know if he stayed there or punched out first, or what he did. But right after we left him Mr. Zevin came in.

Q. The personnel manager?

A. Yes.

Mr. Rotolo: Any question of that?

Mr. Fitzpatrick: No question on that.

The Witness: And he came in the machine shop with Frank's check.

By Mr. Rotolo:

Q. Were you concerned about this discharge of Ciccone as the union shop committeeman?

A. I was committeeman for the tool room, machine shop, and I questioned Mr. Zevin about Frank's discharge. I asked him why was he fired.

So Mr. Zevin said, "Because of trying to get people to sign with 3127. You know the boss wants 318, and whoever doesn't like it can get the hell out with Frank."

So I asked him if that meant we had to take the boss' union and not the one we wanted.

[fol. 136] And he asked me if I was getting technical. "If so, it is pretty plain—the boss wants 318 and anyone who doesn't want it can get out."

Q. What did you do at that point?

A. I punched out, I believe, or shortly thereafter.

Q. And did Frank Ciccone punch out with you?

A. Yes. I don't know if he punched out before or after I did. I don't recall.

Q. Who else walked out with you?

A. The whole machine shop. They all heard this, and I believe every man walked out.

Q. When Mr. Zevin was talking to you about that, was he talking loudly or softly?

A. Oh, yes, he was pretty excited.

Q. How many employees were in the tool room at that time?

A. About five or six. I believe that is all we had.

Q. Was Libutti there?

A. Yes, Carl Libutti, Frank Ciccone, Leo Weinberg, Eddy Herzig, John Balko. I don't recall if there was any one else.

Q. Was there an employee by the name of DeSantis, or DeSanto?

A. Yes, but I don't know if he was working at the time.

Q. Was Ciccone in the room at the time that Zeyra talked, or had he stepped out; do you recall?

A. I don't remember, no. When we were arguing we were both pretty excited, I guess, and I didn't notice whether he was here or not.

Q. But you did see the others present, did you not?

A. I know they were all there because the way I was facing I was looking at the whole shop, whereas if Frank had gone into the washroom he would be behind me. I don't know if he did or didn't.

[fol. 137] Q. Now, what happened after you left the plant with Ciccone and Libutti and the others?

A. We went outside and stayed in front of the plant. Someone—I don't know who it was—informed Mr. Saul of what had happened, and I believe he came——

Q. Someone called Mr. Saul?

A. Yes, and he came up maybe a half hour or an hour later, I don't know.

Q. Meantime, when you were waiting for Mr. Saul, did any more employees come out of the factory?

A. Yes, there were others. I don't remember the names, but there were a few others.

Q. Quite a number of employees came out?

A. Yes.

Q. So that when Mr. Saul came out there was quite a number of employees?

A. Yes, quite a number.

Q. Do you know whether a shift of employees quit work around four o'clock?

A. Somewhere around that time—3:30—4:00.

Q. The molding department?

A. That is the only one that ran three shifts, the molding department is the only one.

Q. Did you recognize some of the employees from the molding department in the group outside the plant?

A. Yes, I recognized them.

Q. Was any picket sign——

Mr. Fitzpatrick: Will you fix the time?

By Mr. Rotolo:

Q. After Mr. Saul arrived on that day, Friday, November 10.

A. I believe we had some make-shift signs about unfair labor practice, or some such thing.

Trial Examiner Leff: Was that before Mr. Saul arrived, or after?

The Witness: No, after.

* * * * * * *

[fol. 138] Q. Now, did you meet Mr. Maccaferri after November 10 and have any conversation with him; specifically, did you meet him once at the Gunhill Road Post Office?

A. Yes, quite often. Once we had a few words.

Trial Examiner Leff: What date?

The Witness: I don't recall the date.

Trial Examiner Leff: Fix it by something else. How long after the strike started? How long after the work stoppage started, rather.

The Witness: Well, it would have to be sometime after December 12, I believe, because what I am going to say has reference to that date.

By Mr. Rotolo:

Q. That was the date when the letters went out discharging the employees; is that right?

A. That is right.

Q. Is that the date you have reference to?

A. That is the date.

Q. It was after that that you met him at that Post Office?

A. That is right.

Q. Tell us what was said.

A. He told me he wanted me to go back to work for him. I told him I had been discharged when he sent that letter to me, and he said if I was willing to give up 3127 I wouldn't have to worry about the letter; that was just done on his lawyer's advice and it didn't mean anything.

Q. Did you go back after that?

A. To work? No, I didn't.

Q. Did you talk to him on any other occasions?

A. Yes, once more about the same thing.

Q. That was before the letter or after?

A. After the letter and after this time at the station. There is a big iron gate in front of his plant, and there was something wrong with it, and he and a few others of his men [fol. 139] were fixing it, and we asked him something about 3127.

Q. Who is "we"?

Were you picketing at the time?

A. Yes, I was on the line along with Ruth Shaw, Madeline Smolen, Fonagy and, I think, Carl Libutti was there.

Q. Who spoke up first? Did you talk to Mr. Maccaferri first?

A. It was more or less——

Q. Or did he talk to you?

A. I don't know how it started. We were talking about something, and then the question came up of us going back to work, or even negotiating—I think that is what it was; we had asked him why he wouldn't even negotiate with us or talk to us about the strike, and he said as long as we stayed with 3127 he wouldn't even talk to us.

* * * * * * * *

Cross-examination.

* * * * * * * *

By Mr. Fitzpatrick:

Q. Can you say that Zevin was present when Moresco was solicited?

A. No, I can't say that he was present at that particular time, but I do know that he was there while Frank was soliciting because, as I said, he did it quite often and Zevin ate in there practically—not every day, but fairly often.

Q. Did Zevin make any comment about it?

A. Not to me or to anyone else that I heard.

Q. Do you know whether he saw Ciccone?

A. Yes, I know he saw him.

Q. So as to know what Ciccone was doing?

A. I don't know that he saw names on the card or what union it was, but he knew—he saw him taking cards around and soliciting for signatures.

[fol. 140] Q. You say the same with respect to Studli?

A. Yes, although Studli had a better chance to see what was on the card because he was closer.

Q. You don't know whether he did or not?

A. No.

Q. Frank made no secret of it, did he?

A. No.

Q. He didn't seem to be afraid of Studli or Zevin?

A. For all I know, he might not even have known that they were there and I don't think he would have any reason to be afraid.

* * * * * * *

[fol. 141] By Mr. Fitzpatrick:

Q. Again, taking you back to the 10th of November, do you remember when you went out of the plant in the afternoon whether you were with Ciccone?

A. I don't think I was.

Q. Had he already left or was he still in the plant as far as you know?

Trial Examiner Leff: What is that name?

Mr. Rotolo: Ciccone.

By Mr. Fitzpatrick:

Q. Ciccone.

A. I don't remember if he was still in the plant or if he had left before me. Now that I think of it, I am pretty sure I left without him.

Q. Do you recall whether he was on the street outside when you got out there?

A. I couldn't say for sure.

Q. As far as you recall, you were on the street first?

A. I don't know, I am not sure.

Q. You are not sure?

A. I am not sure.

Mr. Rotolo: I think we might stipulate on some of this.

Trial Examiner Leff: I don't know if Mr. Fitzpatrick wants a stipulation. Ask him, first.

Do you want a stipulation on this subject?

Mr. Rotolo: I want to stipulate one fact that might be relevant. May we go off the record?

Trial Examiner Leff: Yes.

(Discussion held off the record.)

Trial Examiner Leff: On the record.

Mr. Rotolo: Mr. Examiner, in an off the record discussion with counsel for the respondents, it was suggested that a stipulation be entered into concerning the time when Ciccone punched his time clock on November 10, left, and the time that Mr. Pierone and Mr. Libutti checked out on that day.

[fol. 142-143] Our examination and investigation shows that the time card of Mr. Ciccone was punched at 3:03 while that of Mr. Pierone and Mr. Libutti shows that they checked out I think it was 3:17 or 3:19. Let me check that.

Do you know what it is?

Mr. Fitzpatrick: My recollection is that it was 3:17.

Trial Examiner Leff: All right. The stipulation is approved.

Mr. Fitzpatrick: If I find out otherwise, I will examine on it.

Mr. Rotolo: All right.

By Mr. Fitzpatrick:

Q. Did you talk to Zevin before Ciccone left?

A. Before he left?

Q. Yes.

A. I talked to Mr. Zevin when he gave Frank the check. That is when I started talking to him.

Q. You talked to Studli also before Ciccone left?

A. Yes—well no, I didn't talk to him before he left, no. When Mr. Studli told Frank that he had to fire him, Frank asked him why. I just overheard that. I had nothing to say.

Q. You didn't talk to Studli at all?

A. At that time; no, I don't think so.

Q. Do you recall what you did between 3:03 and 3:17 when you, yourself, checked out?

A. Well, I was talking to Mr. Zevin and when he told me to get out, I probably began collecting my tools together and washing up and then I punched out.

Trial Examiner Leff: I don't understand. Who told you to get out?

The Witness: Mr. Zevin.

Trial Examiner Leff: He told you to get out?

The Witness: That is right. He told me if I didn't stick with 318, and if I wanted to join 3127 I could get out too.

. . . . . .

[fol. 144] Trial Examiner Leff: What, if anything, did he say about fixing machines in the molding room?

. . . . . .

A. I suppose you are referring to Mr. Maccaferri, told him he didn't want him to go around the rest of the shop.

Q. I believe that was your testimony.

A. Yes. Frank explained to him that to do his work, he had to go to these other departments or rooms because that is where his work was. He was repairing these machines or keeping them operative.

Q. What did Maccaferri say to that?

A. He told him—I don't care about the machines or something like that. I don't want you to go into the other rooms, the other departments.

Q. Maccaferri—did Maccaferri say anything about firing Ciccone at that time?

A. I didn't hear him, no.

Q. Did he say that he would fire him if he left his bench?

A. No, I didn't hear him say that.

Q. You didn't hear him say that?

A. No.

Q. How far away from the two of them were you?

A. About two feet, not less.

. . . . . .

[fol. 145] Q. Is it your testimony that Maccaferri didn't say anything about firing Ciccone or you don't remember whether he said anything?

A. I said I didn't hear him say it and I was close enough to hear everything that was said.

By Mr. Fitzpatrick:

Q. I have reasons for mentioning the other. Who else was there at the Coca-Cola machine?

A. When I arrived there?

Q. Yes. On the day Frank was fired.

A. There were about three or four others there.

Q. Was there anybody who wasn't from the tool room?

A. Yes, that is what I mean, three or four others than from the tool room.

Q. Can you recall any names?

A. No. They didn't stay there too long, neither did we, we just got the coke, drank it, and left.

Q. Was there any discussion there at that time?

A. The usual discussions, nothing relative to union activity or anything like that.

Q. During that day, had you had any discussion with Ciccone about union activity at all? Up to the time he was fired?

A. I might have. I couldn't say definitely no.

Q. Did Frank have any cards with him on that day?

A. I don't think so. I didn't see any.

Q. Did you ever see him have any of those cards in the plant?

A. None.

Q. The only place you saw him with cards was in the restaurant?

A. That is right.

Q. Do you know how he came to be selected as the one to solicit cards?

A. Well, from what I understood after all this, it was more or less his idea.

Q. You testified in connection with your solicitation for [fol. 146] 318 that you explained to the employees what the score was. Tell us what you told the employees.

A. I told them what Mr. Maccaferri told me that if they didn't sign, they would go out.

Trial Examiner Leff: When was this? When are we talking about now?

The Witness: He is talking about after Mr. Maccaferri gave me the cards and fold them to get them to sign it.

CARMEN LIBUTTI was called as a witness by and on behalf of the General Counsel and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rotolo:

Q. MR. Libutti, will you state your full name?

A. Carmen Libutti.

Q. Where do you live?

A. 4044 Barnes Avenue, Bronx, New York.

Q. Mr. Libutti, were you employed by Mastro Plastics Corporation prior to November 10, 1950?

A. Yes, I started August of '47.

Q. In August of 1947?

A. Yes.

Q. In what capacity were you employed?

A. Tool maker in the machine shop.

Q. Did your work take you outside of the machine shop at any time?

A. Not often, very seldom, when a machine or something broke down in another part of the plant,——

Q. In other words, unless you were especially directed to do that——

A. That is right, it wasn't my job.

[fol. 147] Q. Did you join Local 3127 when it was first certified in 1948 by the Stabilization Board?

A. I did.

Q. Did you take an active part in the union affairs? Were you union committeeman or anything else?

A. No.

Q. Do you recall when the contract of Local 3127 was transferred to Local 22045?

A. I do.

Q. Did you transfer your membership to Local 22045?

A. I did, with the rest of the plant.

Q. Did you, at times, act on a union shop committee with O'Neill and some of the others during the contract period?

A. No.

Q. Bringing you up to August, 1950, do you remember another union, Local 65, beginning a campaign to organize the employees of the company?

A. Yes, they used to assemble outside of the plant as we went into work or as we came out.

Q. Were you solicited to join 65?

A. I was, but I refused.

* * * * * * * *

Q. Bringing you back to October 23, 1950, do you recall that Monday being solicited by anyone?

Trial Examiner Leff: Monday, October 23?

Mr. Rotolo: Yes.

Trial Examiner Leff: You are going backwards.

Mr. Rotolo: I am sorry.

By Mr. Rotolo:

Q. Do you remember being solicited on that day by anyone in the plant during the time you were working?

A. Peter Pieroni.

Q. Did you see Peter Pieroni soliciting anyone else in the plant at that time?

A. He grabbed us all around, we all stopped our machines and he told us he just had a talk with Mr. Maccaferri and he [fol. 148] wanted us to join 318. He promised we would get welfare fund and they were a plastic union and he would do business with them. In fact Frank and I were arguing why should we change all of a sudden. Then we went into the wash room and we talked a little more and we finally all signed and came out.

Q. Do you recall whether Frank Cicerone was in favor of this change to 318?

A. He was not in favor and neither was I.

Q. You went back into the tool room?

A. We went back into the tool room and signed the cards.

Q. When you were in the tool room signing these cards, did Mr. Maccaferri come in to the tool room that morning?

A. Yes, he told us he would like us to join. At that time, there was this Lino Albani. We jokingly asked him if he was going to join. He looked at the boss; the boss said he had to join.

Q. Do you know whether that man had been a member of your union?

A. No. In fact, we always talked to him about it but he avoided it.

. . . . . .

By Mr. Rotolo:

Q. I will direct you now to November 10, 1950, the day Frank Ciccone was fired, were you in the tool room at the time that Frank was fired?

A. After we came back from the Coca-Cola machine.

Q. Tell us about that. When is your rest period?

A. From ten minutes to three to 3:00 o'clock.

Q. Had you seen Mr. Maccaferri prior to that time in the tool room, in the early part of the afternoon?

A. Yes, right after lunch, from one to 1:30.

Q. Did you hear him have a conversation with Frank Ciccone?

A. I saw him talking to him but I wasn't near enough to understand what they were talking about.

[fol. 149] Q. Then, about ten to 3:00 you went into the molding room to get a coke with the other boys?

A. Frank and Pieroni.

Q. How long did you stay?

A. Four or five minutes, enough to finish the coke.

Q. Were there other employees around the machine?

A. Four or five from the different departments, glueing department and molding department.

Q. Do you know whether the molding department has a rest period at the same time or do they have a different time?

A. I don't know. I don't know.

Q. Did you get back to the tool room before three o'clock?

A. About a minute or two minutes before three.

Q. Did you hear Mr. Max Studli, foreman of your machine shop, talk to Frank Ciccone at that point?

A. I was right next to Frank when Studli told him he had to fire him.

Q. What did Mr. Studli say?

A. He just got a phone call from Mr. Maccaferri that he had to fire Frank Ciccone.

Q. Did Mr. Ciccone say anything?

A. He said what for? Because of union activities?

Q. Who said that?

A. Mr. Studli.

Mr. Fitzpatrick: May I have that question and answer?

Trial Examiner Leff: Read it, please.

(Record read by reporter.)

By Mr. Rotolo:

Q. What did Frank do? Did he stay in the room or do anything else?

A. I think Frank started to lock his tool box and went to punch his card. I think he had punched his card and by that time Zevin came out with his check.

[fol. 150] Q. Do you recall at the time Zevin came into the room, Frank was away from the room or had left the room or what was the situation?

A. He probably went into the washroom.

Q. Do you recall the conversation that took place between Mr. Zevin and Mr. Pieroni at that time?

A. Pete wanted to know what it was all about, he asked Mr. Zevin why Frank was fired. He said because of the way Frank was acting with union activities.

Mr. Fitzpatrick: Please read the answer.

(Answer read by reporter.)

By Mr. Rotolo:

Q. Was Local 3127 mentioned at that time?

A. I believe he mentioned it was either the boss' union

Trial Examiner Leff: Who is "he"?

The Witness: Mr. Zevan, Mr. Maccaferri wanted 318 and not 3127, so Pete said can't we pick our own union?

He told him don't get technical, either the boss' union or out.

. . . . . .

Q. Do you recall at any time prior to November 10 ever seeing Mr. Ciccone giving out cards for Local 3127 any place?

A. The only time I have been in the restaurant.

Q. You saw him in a restaurant?

A. Yes.

Q. How many occasions?

A. Once or twice.

Q. Was that within a week or two prior to November 10 when he was fired, would you say?

A. Yes, I would say.

Q. Do you know whether your foreman, Max Studli, eats his lunch in that restaurant?

A. Most of the time.

Q. Have you seen Mr. Zevin, the personnel manager, [fol. 151] in that restaurant during the lunch period?

A. Most of the time.

Q. The same time as you and the other boys ate lunch?

A. They had 15 minutes more than we did; the office, but it was the same time.

. . . . . .

STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF MARCH 6, 1952.

. . . . . .

FRANK CICCONE a witness called by and on behalf of the General Counsel, after being duly sworn, was examined and testified as follows:

Trial Examiner Leff: What is your full name?

The Witness: Frank Ciccone.

Trial Examiner Leff: Where do you live?

The Witness: 672 Graind Streget, Brooklyn, New York.

Direct examination.

By Mr. Rotolo:

Q. Mr. Ciccone, were you employed by Mastro Plastics Corporation on and prior to November 10, 1950?

A. Yes, sir.

Q. And what was your work with that company?

A. Sort of a combination job. I was a machinist, and about the last year I was there I was doing quite a bit of maintenance work. When I didn't have maintenance work I would work in the machine shop as a machinist. I worked there about four and a half years.

[fol. 152] Q. And on this machine maintenance work, did that take you to all parts of the plant?

A. Any part of the plant. They would call for me—they had a loud speaker system, and I wouldn't even have to ask the foreman for permission or anything; I had the right to go anywhere in the plant I was called to, or if I thought there were machines that needed attention in the plant I would take it upon myself to go there. I had that permission.

Q. Who assigned you to do that work when you started?

A. Mr. Studli.

Q. And was Mr. Studli in the machine shop, or did he go around the plant?

A. His main job was the machine shop. He was quite a handy fellow, and he also did quite a bit of maintenance work. He was around the plant; at times we worked together.

Q. So the maintenance and repair work on the machines was divided between you and Mr. Studli?

A. I would say practically all of it, unless of some emergency.

Q. There were loud speakers throughout the plant?

A. Throughout.

Q. So that when a call came in from some department that a machine was out of order, either you or Mr. Studli went?

A. That's right.

Q. Did you have to wait for Mr. Studli to tell you when someone called in to go over?

A. No. I would just take it upon myself to go; no permission needed. It was understood.

. . . . . .

Q. Now, I direct your attention to Saturday, October 21, 1950. Were you working on that day?

A. I was the only man in the machine shop working that day. It wasn't in the machine shop, but I was the only man from that group working; we had quite a bit of maintenance [fol. 153] work to do. In fact, I was practically the only one that worked every Saturday. It seemed I would get most Saturdays. I was all over the place that day.

Q. Now, were you directed to come in on Saturdays, especially?

A. Yes, by Mr. Studli.

Q. On that day, October 21, 1950, did you have a conversation with Mr. Maccaferri?

A. I did.

Q. Tell us what the conversation was.

A. It all started over a suspicion that he had that Pete and I were trying to bring in a machinists' union.

Trial Examiner Leff: Pete Pieroni?

The Witness: That is right.

—that Pete Pieroni and I were trying to bring in a machinists' union. That is how the discussion started.

After we got speaking about that he said he believed that we had nothing to do with it, and after I told him the story he said, "Forget about it."

By Mr. Rotolo:

Q. Did he explain how this suspicion came about?

A. Mr. Maccaferri—I think he has a better Gestapo system than Hitler ever had.

Mr. Fitzpatrick: I move it be stricken.

Mr. Rotolo: Yes, I consent to that.

The Witness: I can prove it.

Trial Examiner Leff: Motion granted.

By Mr. Rotolo:

Q. Just tell us the facts.

A. I told Pete I thought Henry Iezzi would bring tales back to the boss.

Q. Who is Henry Iezzi?

A. He is just an ordinary—I would call him a laborer. He may have a fancy title. He worked in the shipping room; he moved boxes and what-not around.

[fol. 154] I said to Pete, "Let's test him."

And Pete and I called Henry over—this was the time all this 65 trouble was and it was before 318, anyway there was this trouble with 65 at that time, all this union business.

I said to Pete, "Let's tell Iezzi we are going to bring in the machinists' union. We don't want 65; we don't want any union; we are going to have a machinists' union. After all, we are machinists."

We had that conversation with Iezzi. He listened to us.

About two days after the conversation I asked Mr. Studli for a raise. I had been asking him right along. So I happened to remind him.

He said, "I am sorry, Frank, I can't even put in a good word for you. The boss feels like firing the whole machine shop. He heard you fellows are trying to bring in the IAM."

I think that it was the IAM. It was a machinists' union.

We left it at that, but it was proof that Henry Iezzi was——

Q. Don't tell us what was in your mind.

Mr. Fitzpatrick: I move to strike that line of testimony.

Trial Examiner Leff: Denied.

Q. When you had a conversation with Mr. Maccaferri on October 21——

A. It was about this subject.

Q. ——statements were made about this——

A. Suspicion that we were trying to——

Q. What did you tell Mr. Maccaferri about that?

A. About the——

Q. About his suspicion you were trying to bring——

[fol. 155] A. I told him somebody was carrying wrong tales to him. It wasn't too much about that.

Q. What was said after that between you?

A. Mr. Maccaferri said, "Don't worry about that. I believe you."

And he produced a card from his pocket. It was what you call a calling card. I don't know—like professional people have.

Q. Name card?

A. Name card. It was a card, something to do with 318. I don't know if it was Mr. Tonelli's name. Anyway, it was a delegate on that.

He said, "I had this card in my office for quite a while."

And he said, "I think, I was thinking I would like to bring this union in, Local 318."

I told him, "We have a union."

He said, "Yes, but Mr. Pressner, of Banner Plastics— he is a creditor of Mastro Plastics; I happened to know Mr. Pressner because he was in the plant—he said, "They have 318 at Banner, and they are very happy with it."

He said, "I want to get 318 into this shop."

Q. Was there any reference made to Local 65?

A. At the time when I spoke to him—we talked over an hour that day. We had quite a discussion about different unions, and I told him, "What about our union?"

He said, "I am not dealing with anyone but 318."

He said, "That is the union I am going to have."

He said, "Local 65 are a bunch of no-good Communists, and 22045 are gangsters and racketeers."

He said, "I'll close the door in the plant before I deal with them, with either 65 or 22045."

He said, "Monday I am going to have some cards, and I am going to call Pete Pieroni into the office and tell him what I want him to do", and, he said, "I wish you would help Pete distribute some of these 318 cards."

[fol. 156] Q. Is that all he said? Is that all you recall that was said? What did you say about that? Did you agree?

A. Not exactly; I didn't agree. I didn't disagree. I did mention to him if he thought so much of the union, why didn't he call the people together and get on the loud speaker on Monday and bring the point out?

He said he wasn't permitted to do such a thing; it wasn't right.

He said, "You just, if you can, if you want to, help Pete out."

He said, "Pete will listen to me. I am going to have a good talk with him Monday morning" and, he said, "I am sure you will all be satisfied."

Q. You say you had been asking for a raise right along?

A. That is right.

Q. Did that subject come up during this conversation?

A. That is right; it did. He didn't make a definite promise.

He told me, after the 318 discussion, he said there would be a very good possibility—I mean he didn't say right out he would make me a foreman—he said there was a good possibility I could be a foreman in the ukulele department.

That is about all of that conversation, I think.

Q. Did you go to work on Monday morning, October 23?

A. That is right, sir.

Q. What time did you go to work?

A. I think we started at 8:30. I could be wrong on that.

Q. What is your quitting time?

A. Five.

Q. Did you see Pieroni on Monday morning?

A. Yes. We, Carl, Pete, this fellow Nick—

Q. Who is Carl?

A. Carl Libutti. Pete Pieroni, there was I, and a few others, would meet in this little luncheonette across the [fol. 157] street before going to work; we always had our coffee there. We would usually meet there.

Q. Did you all check in to work that morning?

A. Yes, sir.

Q. Now, after you got into the plant—

Trial Examiner Leff: This was on Monday? Are you talking about Monday morning?

Mr. Rotolo: Yes.

By Mr. Rotolo:

Q. After you went in the plant, what happened then?

A. We went around about our work. I happened to be working in the machine shop that morning, and I knew Pete was going to be called into the office—at least, I pre-

sumed he was—and he actually did get called in. I don't know, maybe 8:30 or 9:00 o'clock in the morning. And we went right on working.

Q. Did you see him come back from the office?

A. Yes. I have seen him come back. I don't recall the time. It may be an hour or so. It could be less than that.

He came out, he gathered us, he told us to stop working. Mr. Studli happened to be right there at the time, too, and he told us to stop working, that he had something to say.

He told us the conversation, part of the conversation, he had with Mr. Maccaferri, and he showed us cards from Local 318. He said that Mr. Maccaferri told him that that would be the only union he wanted to deal with and—I don't know—a few other things. It was either that union or none.

Well, the other fellows didn't say much at the beginning, but I was dead against it; I couldn't see any part of it, and we had quite an argument.

Well, Pete, seeing that——

Q. Where was this argument?

A. A little off the center of the machine shop, more toward Mr. Studli's office.

[fol. 158] Pete, seeing the discussion was getting a little hot and Mr. Studli was around, he figures we should go into the wash room. And that we did.

And we stayed in that wash room a good half hour before Pete could convince me to string along with 318, because he figured we had no choice in the matter there. I was for having it out with Maccaferri right then and there about joining 318 or no union at all. But at that minute there wasn't much we could do.

Q. After this discussion did you take any 318 cards?

A. I signed a card. I figured we might as well play along with him and see what we could do later on that night or afternoon.

Q. After you came out of the wash room and had these discussions, did you see Mr. Maccaferri?

A. Yes. He walked in the machine shop—and we still hadn't gone back to work—and he told us that we should sign the cards and that we would all be satisfied.

Q. Did you see any employee by the Lino Albani?

A. Yes.

Q. In the machine shop or near by at that time?

A. When Pete handed me cards to try to get some signatures, I took a few half-heartedly, and Mr. Maccaferri left the machine shop at the time heading for the packing room, and as we were approaching the exit of the machine shop Peter Pieroni handed a card to Lino Albani, and he told him to fill it out. And this fellow Lino said "no", and the boss happened to be there. He said, "Fill it out Lino; it's all right."

And Albani filled it out, and the three of us went out into the packing room.

. . . . . .

[fol. 159] By Mr. Rotolo:

Q. Did you take any cards from Peter Pieroni then?

A. I would say I took about thirty-five.

Q. For distribution?

And did you and Pieroni go out?

Trial Examiner Leff: Those are 318 cards?

The Witness: Yes.

By Mr. Rotolo:

Q. When you left the machine shop where did you go?

A. We headed for the packing room and Pete went his way and I went my way. It is a large room. There is the molding room adjoining it and a shipping room, and I don't think anyone was working. There was quite a discussion all morning of this 318. I got a few signatures to string along with the deal. That is the only reason why I got them.

Q. How many did you get signed up?

A. At the most there would be four or five.

Q. Who did you give them to?

A. When I had them signed up?

Q. Yes.

A. I gave them back to Pete Pieroni.

Q. What time of the morning was it that you gave out these cards?

A. Well, possibly around eleven.

Q. When is your break period in the morning?

A. Ten to ten. Wait a minute. You might have to correct me on that. It was either ten to ten or ten.

Q. Did you give the cards out during the break period or during the work hours period?

A. There was no break period that morning. That whole morning was a break. I don't think anyone did a bit of work in the shop. I know we didn't and the people I was talking to

Q. Did you do any of your usual work that morning?

A. Not a bit.

[fol. 160] Q. When did you finish getting these cards signed?

A. I would say we spent the whole morning on it, or discussing it and giving out cards.

Q. When you approached someone to solicit him to sign a card was there discussion between you and the employee?

A. Definitely, yes.

Q. What did you tell him?

A. I explained the situation that the boss had told Pete, and that he had also spoken to me on Saturday, and that this was the union he wanted. The few I could trust I told them to sign them, and that we would try to straighten it out later, fight it out some way later, but for the time being to sign it and work things out. We had no choice.

Mr. Fitzpatrick: I understand that to be a statement which he made to other employees?

Mr. Rotolo: No.

Trial Examiner Leff: I understand it was a statement made to the Trial Examiner.

What did you mean?

The Witness: Well, we did discuss it, quite some discussion about it, and there were a few people I thought I could trust, and I told them to sign for the time being, that we really had no choice in the matter. It was either sign it or start a big riot there, and I remember Antoinette Radice was one; Jane Panculli, Ralph Moresco, Joe—I think it was Cirillo. I don't know how to spell that name.

By Mr. Rotolo:

Q. This was in the packing room?

A. It could have been the packing and assembly. There was also a ukulele department. It is quite a long shop. It

seems that everything is adjoining there. Joe Cirillo, I [fol. 161] think he was a buffer up in the ukulele department or the shoe department.

Q. Now, did you work that afternoon?

A. Did I work? Yes.

Q. Do your regular work?

A. Yes. I think we went back to normal.

Q. Did you do anything after you left the plant that night?

A. I called up Mr. Rothenberg and told him what had happened. He told me that we had done a foolish thing and, as I said before, we had no choice in the matter. Well, I don't know whether we had a meeting for that night or we called a meeting.

Q. But there was a meeting?

A. There definitely was a meeting. I know there was.

Q. You attended it?

A. Yes. I don't know if it was arranged through the phone call, but there was a meeting.

Q. Had you been notified of a meeting for that night before then?

A. I don't recall. I tell you why: They had a meeting the Friday before, I think, and I was attending night school and I didn't attend that meeting. I was excused.

Q. How were you notified about the meeting that night? How did you know about the meeting?

A. Through the phone call with Rothenberg. He reminded me where it was. How they decided on it I don't know; if it was my phone call or——

Q. Did you see Mr. Saul that afternoon or night?

A. I saw him that night.

Q. At this meeting on Monday night, October 23, was there any discussion as to what happened in the plant during the day?

A. Yes. I was accusing—I happened to accuse Al Mon- [fol. 162] topoli and Grace Cincimino—I had quite an argument with Rose Amoroso. It seems some people wanted her on a committee, and I wouldn't have any part of it, and this group was backing me up. It was all because of this 318 situation.

Q. Was Virginia O'Neill at that meeting?

A. She left after a little discussion with Pete. They had quite a little argument, too.

Q. When you accused Rose Amoroso, was she present?

A. I think she already left. I happened to start accusing Rose Amoroso when they had agreed to sign cards for 3127, and we heard that Rose, Vern and Al Montopolo and Grace Cincimino had been the cause of this 318 deal; they had gone down to the 318 office. I couldn't see the tie-in there; I knew there was something fishy.

Q. How had you gotten that information?

A. I don't recall. I guess through various people in the shop.

Q. Do you recall anything else that was discussed at that meeting that night? You mentioned there was a signing of 3127 question which came up.

A. Yes, we signed—I would say everyone in the place, including Al Montopoli and Grace Cincimino—signed cards for 3127. We also signed a form, I think, renouncing our membership in 318.

Q. Had Virginia O'Neill left by that time?

A. Yes, she had gone before the signatures were——

Q. Was Mr. Rothenberg there?

A. Yes.

Q. Was Mr. Saul there?

A. I would say yes.

Q. Did Mr. Rothenberg make any explanation on the transfer of affiliation?

A. We had always wanted a welfare plan. These meetings—some of them—between school and meetings, we had [fol. 163] so many meetings between committee members and the union, the shop meetings, that some of them could be a little confused.

Q. You weren't on a committee, were you?

A. After this meeting I was more of a card man than anything else; getting cards signed, but we had always wanted a welfare fund. Originally we had one. I think in our original contract in 1948 we were denied it. I don't know the background of that. When we went to this 318 they made a terrific splash about welfare fund. I think they gave out circulars. We felt that we were entitled to it. In all our discussions in the shop way before this

trouble, we always discussed welfare fund, and the only way we could get one—I don't know why, or the history—it was by switching to 3127; 22045 couldn't carry it or something. I don't know. I don't know the reasons.

Q. Was a vote taken that night to switch to 3127?

A. Yes.

Q. Do you remember whether Alma Zwoboda was there?

A. I couldn't recall.

Q. You do recall Grace Cincimino and Al Montopoli?

A. I got them to sign the cards. They signed for me right in my presence.

Q. And did Rose sign that night, too?

A. Yes.

Q. Did you go to the conference with Mr. Maccaferri on Wednesday of that week when the demands were presented?

A. They had, as far as I recall, two conferences. I only went to one; the day I can't remember. I went to one. That was a very short one, to my recollection.

Q. Do you remember what Mr. Maccaferri said at that conference which you attended?

A. The one I attended, I think I had already been on the outs with Maccaferri, so I stayed in the background. [fol. 164] Actually, the only reason I was on the committee was mostly to get these cards, the signatures on these cards. Someone presented demands to him, and he mentioned something about checking with an auditor or an accountant. He mentioned something about having tickets for a theatre that night.

Q. It was a very short conference?

A. If I recall it, it wasn't anything too lengthy.

Q. After this meeting on October 23 did you continue getting cards signed for 3127?

A. We had at that time, I would say, about 150 people working in the plant, and I would say one-fourth of them were not at the meeting for various reasons. I don't recall why. Some may have been on the night shift, or things like that. I went around and gathered, I would say, a good 20 or 25 signatures between that time and November 9, 8 or 9, somewhere around there.

Q. Where did you do this? Where did you solicit these people?

A. During lunch hour, in the shop. Most of the lunch hours I would stay in the luncheonette; before work in the luncheonette; after work. Possibly a rest period. I don't remember. It was quite a job.

Q. Now, do you recall on any of these occasions when you solicited members in the luncheonette ever seeing Mr. Studli or Mr. Zevin?

A. Mr. Studli practically ate with us every time we were in there; he would always join our group. I was quite open in my discussions. Mr. Zevin would eat there quite often, and Zevin and myself and a group of people would go home together every night in the car, and we discussed it together quite a few times.

Q. You discussed what?

A. All this union business. He knew what I was up to. In fact, once or twice he told me I was doing the wrong thing. He didn't threaten me because at night we would [fol. 165] be going home as friends. One of the fellows owned the car, and we all headed out toward Brooklyn, and I think there were six of us, and at that time the discussions were always about unions. They knew what I was doing.

Q. Do you remember any specific occasion when you distributed 3127 cards in the restaurant that you saw Mr. Studli or Mr. Zevin in the luncheonette?

A. Yes. I don't remember the date, but I think I did every day. It was quite a job convincing some of the people, or getting, you know, finding some of them at certain times. I can't think of names. I know names that I got cards signed at that particular time. There was——

Q. I haven't asked for names yet, Mr. Ciccone.

In relation to the time you were fired, when was this occasion that you saw Mr. Studli and Mr. Zevin in the luncheonette?

A. Oh, a week to ten days. I would say approximately eight or ten days, within those eight or ten days before I was fired. We were in there practically, I would say, almost every day in the luncheonette for lunch or coffee.

Q. Did the company have a cafeteria in the plant at that time?

A. No.

Q. Directing your attention to the Friday night of that same week, that is October 27, 1950, do you recall after you punched out from work that day anything unusual happening in front of the plant?

A. Friday? This fellow Nick Livoce had gotten himself another job, a better job, and I think we had a few drinks. I don't know whether it was in the plant or outside, but it was sort of a farewell, and Pete Pieroni, Carmen Libutti, I think it was Jane Pasculli, or something like that, and myself were standing maybe anywhere from 20 to 50 feet [fol. 166] up on the same side of the plant, and just happened to be talking. I don't know what the conversation was, and I saw three people come out of the office of the plant. I knew one was Mr. Maccaferri and the other was Mrs. Maccaferri. I didn't pay much attention to it.

Q. Did you recognize the other man?

A. No, sir. I say we just happened to see three people. We looked that way, and Pete happened to say, "I think that is Mr. Tonelli. Something about him looks familiar." I said, "Let's make sure; we'll find out who it is."

And we followed this person directly across the street to the luncheonette.

Q. Did Carmen Libutti go across with you?

A. No.

Q. Just you?

A. Just Pete Pieroni and I.

Q. And the girls?

A. We left the girls with Carl. What he did after that I don't know.

Trial Examiner Leff. He took her home, he said.

By Mr. Rotolo:

Q. Did you and/or Mr. Pieroni engage this man who went across the street in conversation?

A. We had quite a conversation with him.

Q. Was this in the luncheonette or out?

A. Both in and out. We had coffee with him. The conversation was in both places.

Pete said, "Hello, Mr. Tonelli."

He said, "Hello."

I think Pete mentioned something about having met him at some local office of 318. I don't know the background of that.

I said to Mr. Tonelli: "I don't like this idea of—how come you are coming out of the plant with the boss. It smells like a fix here or something. You have no right dealing with the boss."

[fol. 167] At that time his delegates claimed they never met Mr. Maccaferri, didn't know who he was; they had never seen him. He denied it. Finally we got——

Trial Examiner Leff: Denied what?

The Witness: That he had come out of the plant, or that he ever knew Mr. Maccaferri.

Finally we got him to admit it, and he said, "So what? Even if I do know him, once we are in there we'll see that we will take care of the workers", or something to that effect.

Trial Examiner Leff: Let's take a recess.

(Recess taken.)

Trial Examiner Leff: Will you proceed, Mr. Rotolo?

By Mr. Rotolo:

Q. Mr. Ciccone, I direct your attention to two days before you were discharged; that is November 8; did you have any conversations with Mr. Maccaferri at that time concerning your work?

A. The 8th, yes, I think it was in the morning.

Q. What was the conversation?

A. He accused me of not wanting a—

Mr. Fitzpatrick: I object to the form of the answer.

Trial Examiner Leff: Yes, just tell us what he said.

The Witness: I wouldn't dare tell you the language he used.

Trial Examiner Leff: We don't mind.

The Witness: I wouldn't say it.

By Mr. Rotolo:

Q. Tell us what he said.

[fol. 168] Trial Examiner Leff: We are all adults here.

The Witness: He says "I am wise to you no good

s. o. b.'s". I don't know who the other person was that he referred to. He said "You fellows are trying to ruin me. When somebody calls you to come up and fix something, you fix it. I don't care what anyone else tells you to do."

I told him I had permission. I have to probably relate the incident previous, how this came about.

By Mr. Rotolo:

Q. Tell us what had happened in your work——

A. Well, I think this took——

Q. —on that day or the day before.

A. The day before it took place. I had been working with Fred Korn, he is an engineer. I don't know what his title is. We were repairing a clothes pin assembly machine in the molding room.

Q. Who is we?

A. I was helping Fred Korn. He was sort of supervising, so to speak.

Q. In the machine shop?

A. In the molding room. It was an automatic machine.

Mr. Fitzpatrick: We have referred to them in the record as spring machines.

A. That might be a different machine. This was an entirely new machine. The spring machine—you can stop me—I am not out of order?

Trial Examiner Leff: No.

The Witness: They were the new type that most of the girls were using at that time.

Trial Examiner Leff: I don't suppose it is important. You were repairing the machine. What happened?

The Witness: A call came over the loudspeaker. It said [fol. 169] "Frank Cicoone report to the ukulele department." We were fixing up an injection, I mean we were fixing up this machine at the machine, so Mr. Korn said "Frank, why don't you go to Max Studli and see if he would check it, go up to ukulele and check what is wrong, and you remain with me."

This is Fred Korn. I did that. Max Studli agreed to go repair whatever was wrong in the ukulele department.

That is what Maccaferri was accusing me of not wanting to do. I referred him to—this is the following day—I referred him back to Mr. Studli and he was still abusive. He didn't want to know anything about it. He told me I better watch my step. Any time I got called I would report immediately and do what I was told. I was very calm throughout because it seemed—I think he was trying to start an argument with me. He kept pressing me. I finally walked away from him and I went to Mr. Studli and referred and explained what happened to him.

I asked him if he would go explain to Mr. Maccaferri that he had already fixed the machine. O, somewhere in there I got Grace Cincimino, she was operating it, to admit that Mr. Studli had been up there to repair them the day before and then Mr. Studli himself straightened the matter out with Mr. Maccaferri, told him that he had given me permission to remain with Fred Korn.

By Mr. Rotolo:

Q. Did you, on the next day, the 9th, continue with your usual work?

A. Yes.

Q. Going through the departments fixing machines?

A. That is right.

[fol. 170] Q. I direct your attention to the date November 10, 1950. Did you go into work that morning?

A. Yes.

Q. Did you do your work as usual on that morning?

A. Yes.

Q. Did you leave the machine shop that morning?

A. A few times.

Q. Directing your attention to about one o'clock in the afternoon of that day, did you have a conversation with Mr. Maccaferri?

A. I was—at the time—it was right after lunch. I was at my bench working. Pete was at a milling machine which is very close to my bench, let us say a matter of a few feet away. Mr. Maccaferri walked in. He tore right over to me there like a madman and he went off into his——

Mr. Fitzpatrick: I move to strike out the characterization.

Trial Examiner Leff: It may be stricken. What did Mr. Maccaferri do and say?

The Witness: He came over to the spot where Pete and I were standing and again he went into this business of being wise to us and he was sorry that he hadn't stopped me sooner. He says "I want you to leave my people alone, you have been going around signing them up with 3127, they have already signed with 318; why don't you let things be. They have made up their minds already."

I told him they hadn't, he was making up their minds for them. He says to me, "You just mind your God-damn business and remain in the machine shop. From now on your work is going to be in the machine shop. You will not do any more maintenance work." I says but I have to leave the machine shop to do my work.

[fol. 171] He says you work in here. We will find work for you in here steady.

By Mr. Rotolo:

Q. Was his tone of conversation in a loud voice?

A. He is a very loud man. He gets fits of temper once in a while and you can hear him a block away.

Q. Did he appear angry at you?

A. Very angry.

Q. Did you continue working in the machine shop that afternoon?

A. Yes, Max Studli gave me a shop. I don't recall what it was at the time and I went about my business.

Q. Did you leave the machine shop that afternoon for any reason?

A. Say roughly 10 to 3:00 around that time, we took our rest period. We went down to the Coke machine. I think it was right at the beginning of the molding room, the door, there.

Q. Who was with you?

A. In the group I went in, it was just Peter Pieroni, Carl Libutti and myself. I think the other fellows followed. I don't actually recall but they were not in our group.

Q. When you got to the machine, were there any other employees around that place?

A. Quite a few. That rest period I think covered the

whole shop except about 10 or 12 people in the molding room.

Q. Were there discussions going on amongst the employees at that moment?

A. In groups. I don't recall. We were in our own group. We always remained together.

Q. How long did you stay there?

A. Four or five minutes, approximately.

Q. Did you return to the machine shop?

A. Yes, sir.

Q. When was it before or after 3:00 o'clock?

A. Oh, definitely before. We had quite—a supervisor would check on us that way and make sure we kept our schedules.

Q. While you were walking back toward the machine shop, did you see Mrs. Maccaferri?

A. Yes, sir.

[fol. 172] Q. Where did you see her?

A. She had a desk in the far end of the packing room. It was her desk.

Q. What was she doing?

A. She was on the phone.

Q. You didn't know what she said?

A. No, she was looking in our direction with a phone in her hand speaking.

Q. When you got back into the machine shop, did you resume your work about 3:00 o'clock?

A. I don't think we went right to work because we usually went over to speak to Max Studli, if we had a minute or two, we headed in his direction and he started coming toward us before we ever got to him. He says "Frank, I just got a phone call——"

Q. Is there a phone in the machine shop?

A. The machine shop had a small drafting room in it, this fellow Fred Kor—that was sort of his work shop. The phone was right near one of the doors. I don't remember if it was in or out of the drafting room. It was so handy, it didn't matter.

Q. Did you see Mr. Studli talking on the telephone after you got into the room?

A. I don't think so. I really don't recall that.

Q. How long after you got in to the machine shop did Mr. Studli come over and talk to you?

A. We practically met somewhere about the center of the room. As we were walking in, he started probably walking toward us so I wouldn't say. It was probably a matter of seconds.

Q. You were still with Pete and Carl?

A. That is right.

Q. Did you have a conversation with Mr. Studli at that point?

A. No, he was the first one to speak. He said "Frank, I got to fire you."

I said "What for?"

[fol. 173] He says as far as I know, I got a call from—I don't know whether he said the boss or Mr. Maccaferri—that shouldn't matter, anyway, and he told me to fire you. I asked him why. He said probably for union activity. I think it is for union activity.

Q. He said I think it is for union activity?

A. Yes. That was all there was to that conversation. It was very short.

Q. What did you do when Max Studli said that?

A. I did ask him why. I got his answer. There was nothing much to do.

Q. After you were given the answer, what did you do?

A. I think I punched my card.

Q. Where did you go after you punched the card?

A. Well——

Q. Did you go back into the machine shop?

A. The watch was right in the machine shop, not far from where we were speaking. I had tools to collect around the table or on the machine. After that, I went into the locker room and changed.

Q. Did Pete and Carl remain in the center of the room, do you remember?

A. I think so, yes. I don't think I went into the locker. I was paid off before I ever got to the locker room.

Q. Who paid you?

A. Mr. Zevin.

Q. Before you went into the locker room, you say Mr.

Zevin came into the room. He wasn't there when Mr. Studli talked to you?

A. The first conversation, no.

Q. Then Mr. Zevin came in, is that right?

A. Yes.

Q. What did he say to you?

A. He handed me the check.

Q. Did you have any conversation with him about it?

A. I said, "What the hell is the meaning of all this? Why am I being—what is going on? Why am I getting [fol. 174] treated this way?"

He said "Get the hell out and keep your mouth shut."

Q. Then you left, is that right?

A. I may have gathered my tools up and went into the locker room, my clothes, I had to change.

. . . . . .

By Mr. Rotolo:

Q. What did you do after you left the plant if you recall?

A. As I recall I called up Mr. Saul at, I think it was the union office.

Q. Did you tell him what had happened?

A. Yes, he told me to just sit tight and he would try to come down as soon as possible.

Q. While you were waiting for him to come, did you see anyone come out of the plant then?

A. Well, Pete Pieroni, Carl Libutti and the remainder—the tool room as a unit came out. I don't know if they came out in one group, but maybe in seconds or minutes apart. They did come out in sort of a group.

Q. Did your see other employees come out subsequently before Mr. Saul arrived?

A. Yes.

. . . . . .

By Mr. Rotolo:

Q. During this time you were on the picket line, did you have any other conversation with Mr. Maccaferri or were you present at any time when Mr. Maccaferri had conversations with others on the picket line?

A. We had quite a few conversations. I was present at a few and I actually had a few with him myself.

Q. When was the first one that you remember after the discharge?

A. There were two. There were two that stand out. I don't recall which one was first. One was when one [fol. 175] of his foremen, Frank Brown, I think he was a night foreman, I don't know what he was——

Q. When was this? How long after the discharge would you say this was?

A. A month, possibly, maybe more than a month. It was in the morning. Mr. Maccaferri was approaching the plant. We were picketing. I happened to be standing right there. Frank Brown complained to Mr. Maccaferri about a few of the scabs that he had that weren't any good and I chimed in and said to Mr. Maccaferri, if you sit down and settle this thing like a man, you would have your good workers back and we would all be happy. He said "As far as you and the others are concerned, as long as you stick with 3127 you will practically walk out here the rest of your days. The plant will be here but you people won't." I don't know exactly how he worded it.

Q. Is that all he said?

A. Yes.

Q. Was he driving or walking at that time?

A. He was walking. There was another incident. We had a few with them at the Post Office, at the entrance to the plant. His usual attitude was "drop dead, you s. o. b.'s" or he would call the union a bunch of gangsters and racketeers, he would never sign with 3127 as long as he lived.

* * * * * * *

[fol. 176] Jean Bowerman a witness called by and on behalf of the General Counsel, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your full name?

The Witness: Jean Bowerman.

Trial Examiner Leff: Where do you live?

The Witness: 4589 Park Avenue, New York.

By Mr. Rotolo:

Mrs. Bowerman, were you employed by Mastro Plastics Company on and before November 10, 1950?

A. Yes.

Q. And how long had you been working for that company prior to that time?

A. I worked there March first, 1947.

Q. You started then?

A. I started then.

Q. And in what department did you work?

A. Packing department.

Q. Were you always in the packing department?

A. Yes.

Q. And who was your supervisor on November 10, 1950?

A. Mrs. Maccaferri.

Q. Do you recall in 1948 when Local 3127 was certified by the State Labor Board as the bargaining agent of the employees of that company?

A. Yes.

Q. Were you a member of 3127 at that time?

A. Yes.

Q. Do you recall later on in 1949 that the contract between the company and 3127 was changed over to Local 22045?

A. Yes.

Q. Did you become a member of Local 22045 then?

A. Yes.

Q. Do you recall some time in the summer, about August or September of 1950, that Local 65 of the Retail Employees Union started a campaign to organize the employees of Mastro?

A. Yes

[fol. 177] Q. Did you join Local 65 at that time?

A. Yes.

Q. I direct your attention to the date October 23, 1950, Monday, October 23, 1950.

Did you go to work on that day?

A. Yes.

Q. What time do you report for work?

A. 8:30.

Q. And do you punch the time clock when you go in to work?

A. Yes.

Q. Where is the time clock in relation to your place of work in your department?

A. It was between the packing department and the molding department.

Q. Is it near the entrance to the packing department?

A. Yes.

Q. When you arrived on the morning of October 23, 1950, did you punch the time clock?

A. Yes.

Q. Did you see Virginia O'Neill that morning?

A. Yes.

Q. Where was she?

A. She was near the time clock.

Q. Virginia O'Neill was your shop steward; is that right?

A. Yes.

Q. Who else was with her?

A. Tony Moretti, Al Montopoli—that's all.

Q. And what happened at that time when you came into the plant?

A. They had cards in their hands, and I think it was Al who said we have to take these cards and sign them.

So I said, "What are these for?"

He said, "A new union. Mr. Maccaferri knows all about it." That if we didn't sign them we would be automatically fired.

Q. Now, where was Mr. Montopoli standing in relation to the time clock?

A. Very close to the time clock.

Q. Had you already punched your card when he talked to you?

A. Yes. There was Mrs. Petrus——

[fols. 178-179] Q. Elizabeth Petrus?

A. Yes.

Q. Does she work in the packing room?

A. Yes.

Q. Did you sign the card at that time?

A. No, I didn't.

Q. What did you do with it?

A. I took the card, Elizabeth and I—we were walking away—there was Mrs. Maccaferri there also coming towards us. When she got near, Al Montopoli and Tony Moretti, they were telling us that we had to sign these cards.

Q. Who is "they"?

A. Mrs. Maccaferri, Tony Miretti, Al Montopoli and Virginia O'Neill.

Q. Do you recall what Mrs. Maccaferri said?

A. She said that it was all right to sign for 318, because the boss knew it, and that's the union he wanted in, because it was a very good union and had a very good contract, and if we didn't sign it we won't be able to go to work.

Q. Did you sign the card at that time?

A. No, I didn't.

Q. Did you go to your place of work?

A. I went to my machine and sat down. After a while, about twenty minutes later, Al Montopoli came over with Tony Moretti.

He said, "You signed the card yet?"

I said, "No."

He said; "Sign it now and give it to me."

So I signed it and gave it to him.

Q. Who is that?

A. Al Montopoli.

Q. Was any other employee with you at the time that you were being spoken to by Al Montopoli, Virginia O'Neill and Mrs. Maccaferri?

A. Yes, there was Mrs. Petrus, Lillie Maddalena, and Gloria Gonzales.

. . . . . .

[fol. 180] Q. I direct your attention to the date November 10, 1950, Friday, November 10, 1950. Did you go to work on that day?

A. Yes.

Q. You were working in the packing department, as usual?

A. Yes.

Q. Was Mrs. Maccaferri present that day?

A. Yes, she was.

Q. Now, try to recall sometime in the afternoon of November 10, 1950. Did anything unusual happen in your department on that day?

A. Well, there was a big commotion over Frank coming in for a Coke about ten to three; we had our relief period then. There was a lot of commotion, talking, and about three o'clock the talking was still going on. Mrs. Maccaferri was down at her desk. So one of the girl's machines had broken down, and she wanted to send for a machinist, and when——

Q. You mean Mr. Ciccone?

A. Yes.

. . . . . .

[fols. 181-182] And Mrs. Maccaferri said that Frank is not allowed in our department. She hadn't said yet he was fired.

Q. This was at what time in the afternoon?

A. About three o'clock.

So finally the girl couldn't keep working because the machine was still broken. She waited about ten minutes.

Q. Who is the girl?

A. Jane, one of the girls. Her machine broke. I don't know her last name offhand.

Finally she, the boss' wife, came around, Mrs. Maccaferri, and she said, "Frank is not here no more. He's just been fired for making trouble with 3127, with this union business. And if anybody else starts the same thing they'll be going just like him."

Q. What happened then?

A. Three of the girls got up to walk out when they heard Frank was fired.

. . . . . .

[fol. 183] TESTIMONY OF ANTOINETTE RADICE

Q. When did you first hear that Frank Ciccone was fired?

A. Around a half hour or so after Jane had called the first time, she called him the second time and that is when

the boy came in and told us Frank was fired so everybody started talking about it.

Q. Did you notice any employees leave their place at work when the boy came back and said Frank was fired?

A. Yes, Jane got up and Mary, and Sissy.

Q. Mary Occhino and Sissy Martoni?

A. That is right.

Q. Did any of the others get up and walk out?

A. No, not that I know of.

Q. Did you remain at your place of work?

A. Yes.

[fols. 184-185] Q. Until the end of the work day?

A. Yes, I did.

Q. When these girls got up and walked out, was there any commotion in the place or discussion?

A. Everybody was talking about it and I don't think much work was done after that. We were all wondering what was going on.

Q. Was Virginia O'Neill there?

A. Yes, she came in.

Q. Was Mrs. Maccaferri at her place, her desk, or whatever it is she has there?

A. She was back there in the beginning then she was walking down to us, she was always in between the machines.

Q. Did you hear her say anything at that time?

A. When we were about to walk out she was laughing with Virginia and she walked through and said Frank had been fired and everybody else who don't join the union would be also.

Q. Didn't join what union?

Trial Examiner Leff: Who said this?

The Witness: Mrs. Maccaferri.

By Mr. Rotolo:

Q. What union?

A. 318.

Q. Is that all she said?

A. Yes.

Q. This is when you were leaving, is that right?

A. When I was leaving.

Q. How many other girls were with you when she said that?

A. We were all around there and she was walking right through us all. We were all leaving. Some were going up to get their coats.

. . . . . .

[fol. 186] TESTIMONY OF ELIZABETH PETRUS

Q. Do you remember the day that Ciccone was discharged? That is November 10, 1950.

A. Yes.

Q. How did you hear about Ciccone being discharged?

A. I heard it about 4:30 or thereabouts in the afternoon, and there was a commotion, and Virginia was in there. Mrs. Maccaferri was down at the end of the room. This day I wasn't working on the table; when I signed the card for Virginia; I was on the other side doing a different type of work.

And they came in and said that—I really don't know who said it—that Frank was fired, and everybody was walking out, the tool room or something went out; everybody in the tool room was fired, also.

Q. What?

A. Thrown out, but I didn't——

Q. You say that was about 4:30? When is your rest period?

A. Rest period is at ten to three.

Q. How long after the rest period was it that this news of Ciccone's discharge came to you?

A. It wasn't too long. I know it was after the rest period, and before we went home.

Q. When the news of Frank's discharge was brought to the packing room, did any of the girls leave the packing room?

A. Yes, there was, I think, three left.

Q. You remember who they were?

A. I think it was Jane——

Q. Jane Pasculli?

A. Yes. And a girl, a Mary, and her cousin.

Q. Mary——

A. I don't know all those girls.

Q. Italian name? If I give you some names will you remember? Will you remember whether they are the girls or not?

A. I think so.

Q. Martone, Sissy Martone?

A. Yes.

Q. That is the girl they call Sissy?

A. Yes.

Q. And Mary Occhino; is that her cousin?

A. That is her cousin. Those girls walked out.

* * * * * * *

[fols. 187-188] Q. Did Mrs. Maccaferri say anything to them before they went out?

A. She said—she was down the other end of the room not near her desk, but more over where the aisle is, and when they went out she said—naturally, we all could hear because there was very little work being done, everybody was watching and interested, and she said that they shouldn't go out because if they don't sign with 318 they are not coming in to work, that Mr. Maccaferri built that plant and he was going to run it his way, and he wasn't going to have any troublemakers in the plant, and if we didn't join up with this 318, which was in Banner Plastics, that he knows is a good union and he wanted it, otherwise we wouldn't work there at all.

* * * * * * *

[fol. 189] Luis Alfred Cartagena a witness called by and on behalf of the General Counsel, after being duly sworn was examined, and testified as follows:

Trial Examiner Leff: What is your full name?

The Witness: Luis Alfred Cartagena.

Trial Examiner Leff: What is your address?

The Witness: 511 East 139th Street, New York.

Direct examination.

By Mr. Rotolo:

Q. Mr. Cartagena, were you employed by Mastro Plastics Company prior to November 10, 1950?

A. Yes.

Q. And how long had you been working there?

A. Since November, 1948.

Q. And during the months of October, November, 1950, what shift and what department did you work in?

A. I was working the second shift in the molding room, injection molding room.

Q. What hours did you have?

A. From 3:30 to midnight.

* * * * * * *

Q. Do you recall about a week later on a Monday, October 23, did you go in to work on that day?

A. October 23? I think so.

Q. Did you see Virginia O'Neill in your department, in the molding room, on that day after you arrived for work?

A. Yes, I seen her.

[fol. 190] Q. Had you seen Virginia O'Neill prior to that time ever come into the molding room after 3:30?

A. No, sir. She was the shop steward for the union that we had before, but she never went around where she was after Local 318 came in the place. She was freely walking and talking to the people trying to get them to join with Local 318.

Q. Did she go into the packing room with the other employees of the molding department and work with them prior to that time?

A. She supposed to go in there in the packing room.

Q. I am asking you did she prior to that time.

A. Prior to that time, yes.

Q. Now, after that time did she go into the packing room, as usual, and particularly on that day?

Mr. Fitzpatrick: I object to the form of the question.

Mr. Rotolo: I withdraw it.

By Mr. Rotolo:

Q. On that day, that Monday we are talking about, October 23, did she go in the packing room and stay there for the half hour she was supposed to?

A. No, sir. She come back to the molding room.

Q. And what did she do? What did you see her do?

A. She went to me and asked me if I want to go to a meeting for Local 318.

She said, "You're one of the old workers in this place. You should go to the meeting tonight.

Q. Did she have any cards with her?

A. At that time?

Q. Yes.

A. No, she didn't have at that time.

Q. Was that a meeting that was going to be held that night?

A. That night after five o'clock.

[fol. 191] Q. Was this on Monday, the 23rd, or was it later in the week?

A. To tell you the truth, I don't recall the date.

Q. Could you tell about what time of the month it was in October?

A. It was between the middle and the end of October.

Q. And you say she asked you to go to a meeting of 318?

A. Yes.

Q. What did you tell her?

A. I asked her, "How about going out in my working hours? Would it be all right?"

She said, "It is all right, because Mr. Maccaferri knew about it."

And then I asked her about me being paid.

And she said, "I am going to talk to him about it."

Q. Who was the foreman of your department on that shift?

A. My foreman was Pastor Lopez.

Q. Did you have any conversation with your foreman, Mr. Lopez, about going to this meeting?

A. Yes. After Virginia O'Neill talked to me—I was going by—he told me, "Luis, it would be all right for you to go to a meeting after five o'clock. I am not sure, but I think you will get paid for it."

Q. Did you go to a meeting of Local 318?

A. Yes, after five o'clock I punched out and went to the meeting.

Q. Where was this meeting?

A. That was in the Bedford Park Restaurant.

Q. Bedford Park Restaurant?

A. Yes.

Q. How long did the meeting last?

A. About two, two and a half hours.

Q. Did any other employee of your shift go to, or department, go to this meeting with you?

A. Nick Pellay. He punched out the same time with me.

[fol. 192] Q. When Virginia had talked to you about going to this meeting, was Mr. Pellay there? Did she talk to him at the same time?

A. Yes.

Q. Did you go home after the meeting, or did you go back to work?

A. I went back to work. I punched in until the end of the night.

Q. Did you get paid for those two and a half hours you were out?

A. Yes, I got my whole week's wages.

Q. When you attended the meeting of 318, who was there, do you remember? Was Miss O'Neill there?

A. Yes, Virginia O'Neill. There was about 12 persons from the company, Mastro.

Q. Do you recall any of the names?

A. I recall a few of them. There was Virginia O'Neill, Al Montopoli, Grace—I don't remember.

Q. Cincimino?

A. Yes. And Mike DeTuro, Dick Pellay, and me.

Q. There might have been a few others, but you don't remember?

A. There were about ten or twelve.

Q. Do you know an employee by the name of Peter Pieroni?

A. Yes.

Q. Was he there?

A. I think so.

Q. Do you know a girl by the name of Alma Zwoboda?

A. No, I don't remember her.

Q. Now, prior to that time that you went to the meeting, did your foreman, Mr. Lopez, permit anyone to come into the room where you were working and talk to anybody?

Mr. Fitzpatrick: I object to the form of the question.

Trial Examiner Leff: Overruled.

The Witness: He was not supposed to permit anybody talking to the operators when the machines was on.

[fol. 193] Mr. Fitzpatrick: I move to strike the answer.

Trial Examiner Leff: I will let the answer stand if you elaborate on what he means.

By Mr. Rotolo:

Q. What do you mean, that he was supposed to keep people out of there? What do you mean by that?

A. He wasn't supposed to permit anybody talking to the operators.

Trial Examiner Leff: How do you know that?

The Witness: I heard Mr. Maccaferri several occasions telling him, "I don't want anybody—" not even us— "—to talk to the operators."

By Mr. Rotolo:

Q. And when Virginia was in that department talking to you people, was Mr. Pastor Lopez present at that time?

A. Yes.

Q. Did he say anything to her?

A. Absolutely nothing.

Q. Do you know a Mr. Ritacco, Bill Ritacco?

A. Yes.

Q. You know who he is, or what work he did?

A. He was foreman of the first shift. Then he was——

Q. First shift of what—molding?

A. The molding room. When I went there he was foreman of the second shift, and they shift around the foreman.

Q. That day you went to the 318 meeting was Mr. Ritacco the foreman of your shift?

A. No, sir.

Q. What was he foreman of? What department, what shift and what department?

A. The first shift.

Q. Molding?

A. In the molding room, yes.

Q. Now, did you see Mr. Ritacco in your room as a practice before that day that you went to the 318 meeting?

A. No. He used to go out four o'clock.

Q. Four o'clock was his quitting time?

A. Yes.

Q. Now, that day that you went to the 318 meeting, did [fol. 194] you see Mr. Ritacco come into your room?

A. I don't recall.

Q. Directing your attention to Friday, November 10, to refresh your recollection as to the day Ciccone was discharged, did you go to work on that day?

A. On my regular hours.

Q. When you come in to work, what time do you arrive at the plant, usually?

A. About ten or fifteen after.

Q. When you arrived at the front of the plant, did you see anybody in the front?

A. No, I don't remember if I seen anybody.

Q. You went in to work, punched in?

A. Yes.

Q. Do you remember sometime during that afternoon having heard that Frank Ciccone, one of the machinists, had been discharged?

A. I remember that it was after four that I heard that.

Q. You heard it after four o'clock?

A. Yes.

Q. How did you hear it, Mr. Cartagena?

A. Well, I was coming out of the washing room, and Virginia O'Neill went to me and said, "Luis, Mr. Maccaferri just fired Frank Ciccone, and he would fire everyone that don't sign with Local 318. I want you to talk to the people and try to get them to sign wih 318 and forget about the old union."

Q. Had you signed a 318 card at that time?

A. No.

Q. What did you say to her?

A. I told her I was tired hearing about the unions, and to go away and leave me alone. I already belonged to a union. I told her I already belonged to a union.

Q. You say that was after four o'clock?

A. Yes, sir.

Q. Was it unusual for Virginia O'Neill to be in your department after four o'clock?

A. It was very unusual. Her quitting time is four o'clock.

[fol. 195] Q. Now, did you see at that time, did you see

Mr. Bill Ritacco, the foreman of the earlier shift in the molding department, come into your room?

A. Yes, he went into the molding room. He went in with Al Montopoli. He went around to the operators telling us that Mr. Maccaferri was going to talk to us later on.

Trial Examiner Leff: Who said this—Ritacco?

The Witness: Ritacco.

Trial Examiner Leff: And who did he say it to?

The Witness: To all of us. He went machine by machine telling them.

By Mr. Rotolo:

Q. Your own foreman was there that night?

A. Yes.

Q. Was it usual for Mr. Montopoli to be in your department at that hour?

A. It was unusual.

Q. Did you see him there at that hour——

A. No, I never seen him before.

Q. Do you know what quitting time Mr. Montopoli has?

A. I don't recall it. It was four or five o'clock, but when they went in it was after five o'clock, when they were telling us Mr. Maccaferri was going to talk to us.

Q. Was it your dinner time, do you remember?

A. No, I don't remember.

Q. Do you usually go out for dinner at night?

A. I didn't go out.

Q. Do you know whether any other employees went out of the plant to eat during the night?

A. I think that one of the boys went out, I think one of the boys went out to get soda.

Q. Do you know whether Mr. Ritacco bought food and brought it into the plant that night for the workers?

A. I don't remember.

[fol. 196] Q. Do you recall what Ritacco told you at the time he came to you on that evening? You say he told you the boss was going to talk to the employees. Did he say anything else?

A. I don't remember.

Q. Was any reference made to Ciccone's discharge?

A. Oh, yes. He told us about Frank Ciccone.

Trial Examiner Leff: What did he say?

The Witness: He told us that Frank Ciccone was being discharged that day, and that Mr. Maccaferri was going to talk to us, and that he was—that Mr. Maccaferri was going to talk to us and he would fire anyone that doesn't sign to 318.

Q. Do you recall that night, shortly before your quitting time, Mr. Maccaferri came to the molding room?

A. Yes.

Q. And talked to the employees?

A. He talked to us.

Q. How long did he talk to you people, if you remember?

A. For about 15, 20 minutes. I don't recall exactly.

Q. Now, can you recall what Mr. Maccaferri told the employees that night in your department?

A. He told us that he wanted us to sign with Local 318 because it was a good union for us, it was a better union than the one we had, and if we didn't do that we may as well stay home, because he didn't want anything to do with the old union no more, or anybody else that belonged to the union.

Q. Anything else?

A. He told us that if we signed with 318 we would be better off; it was a better union, stronger, and we would get along better the sooner we sign with Local 318.

. . . . . .

[fols. 197-199] By Mr. Rotolo:

Q. Mr. Cartagena, do you recall while you were on the picket line sometime around Christmas time, 1950, having a conversation with Mr. Maccaferri?

A. Yes.

Q. Were you alone at that time?

A. No, there were a few of us.

Q. A few of the picketers?

A. Yes.

Q. Tell us what he said to you and what you said to him.

A. He told us why we didn't get wise and forget about the old union, and sign up with 318 and go back to work on Monday, that he would pay us for the holidays, and

everything would be all right. And one of the fellows asked him, "How about the letter that you sent us being fired?"

He said, "Well, we can forget about that notice."

Q. During this conversation was any reference made to Local 3127, the union you were picketing for?

A. I don't remember what he said.

Q. You heard him mention 318, didn't you?

A. Yes.

. . . . . .

[fol. 200] RALPH PRIETO was called as a witness by and on behalf of the General Counsel and, being first duly sworn, was examined and testified as follows:

Direct examination:

Trial Examiner Leff: What is your name?

The Witness: Prieto, Ralph.

Trial Examiner Leff: Where do you live?

The Witness: 2632 Third Avenue, Bronx.

Trial Examiner Leff: Thank you.

By Mr. Rotolo:

Q. Ralph, did you work for the Mastro Plasties Company on and before November 10, 1950?

A. Yes.

Q. What sort of work did you do?

A. I used to work in the injector motor machine.

Q. Is it in the molding department?

A. Molding room.

Q. What shift did you work on?

A. Second shift.

Q. Second shift?

A. Yes.

Q. What were your hours?

A. What?

Q. Your hours, what time did you go in to work?

A. Half past three to midnight.

. . . . . .

[fol. 201] Q. How long did you work for the company before November 10?

A. About five months.

Q. Were you a member of the union 22045, that union that had the contract with the company?

A. I don't remember.

Q. You don't remember that?

A. No.

Q. Did you join any union at all during this period, did you join Local 65?

A. 65?

Q. Yes, the union that was trying to come into the plant in August or September of 1950? You don't remember signing?

A. No, I don't remember.

Q. All right. Did you sign a card to be a member of another union, Local 318?

A. No, I didn't sign.

Q. You didn't sign it?

A. No.

Q. Do you remember the day that Frank Ciccone was fired on November 10, 1950?

A. Yes, I remember.

Q. Were you working that day?

A. Yes, I was working.

Q. Did you come to work at the usual hour, 3:30?

A. What?

Q. What time did you come to work, at the usual hour, 3:30?

A. That is right.

Q. Do you remember on that day that Mr. Maccaferri talked to the employees in your department, in the night?

A. I do.

Q. About what time was it?

A. When he come to talk to us?

Q. Yes.

A. About half past 11 or something like that.

Q. Did you know that Mr. Maccaferri was going to talk to the employees?

A. If I know?

Q. Did you know it before that?

A. Yes.

Q. Who told you about it?

A. Bill Ritacco. He come around and he told *us of all* that the boss is going to talk to us.

Q. Yes. Before that time, did you usually see Mr. Ritacco in your department during the night——

[fol. 202] Mr. Fitzpatrick: Mr. Examiner, I don't see much point to the Ritacco incident. We concede that Maccaferri talked to the people that evening.

Mr. Rotolo: I am getting to something, Mr. Ritacco's presence in that department.

A. What did you say before?

Trial Examiner Leff: Before that night, did Mr. Ritacco come in to your department during your shift, as a rule?

The Witness: I don't understand.

Mr. Rotolo: Let me withdraw the question.

By Mr. Rotolo:

Q. Was Mr. Ritacco an important man of your department in your shift or of another shift, do you know?

A. Another shift.

Q. All right. Did you see Virginia O'Neill in your department on the afternoon of that day, after you started working?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Try to tell us as best as you can what Mr. Maccaferri told the workers on that night of November 10?

A. He got us all together and he say that they have a good union, good group to take care of us, if we won't sign up with them, if we didn't stick with them, we can't come back to work at his plant.

Q. Do you remember the number of the union he gave you?

A. 318.

Q. Anything else?

A. He say that he was giving living to us, that we weren't giving living to him and he wouldn't take no orders from anybody. He say if you don't leave this racketeer union

alone and you don't come and sign up with the 318, you can't come back here any more.

[fols. 203-204] Q. You can or you can't come back?

A. You can't come back.

Trial Examiner Leff: Will you read the answer?

(Answer read by reporter.)

By Mr. Rotolo:

Q. Is there anything else that you remember now?

A. That is all that I can remember.

Q. How long did he talk, do you know?

A. About 15 minutes or half an hour, something like that.

* * * * * * *

[fol. 205] Francisco Tommarello was called as a witness by and on behalf of the General Counsel and, being first duly sworn, was examined and testified as follows:

Trial Examiner Leff: What is your name?

The Witness: Francisco Tommarello.

Trial Examiner Leff: Where do you live?

The Witness: 937 East 213 Street, Bronx, New York.

[fol. 206] Direct examination.

By Mr. Rotolo:

Q. Mr. Tommarello, were you working for the Mastro Plastics Company on November 10, 1950?

A. I was.

Q. How long had you been working for that company before that time?

A. Two years to the day.

Q. What department were you working in?

A. Finishing department.

Q. What were your hours of work?

Mr. Fitzpatrick: What department?

The Witness: Finishing.

My hours were from 8:30 to 5:00.

By Mr. Rotolo:

Q. Where is that finishing department located, in what part of the plant? Is it on the ground floor or upstairs?

A. Upstairs, above the parking lot. There is a garage underneath.

Q. How many men work in that department with you?

A. About 12 or 13.

Q. Is the ukulele department on the same floor?

A. In a different room.

Q. Different room?

A. Yes.

Q. Is it adjoining the finishing department?

A. It is.

Q. Do you know whether the ukulele department has the same hours that you work?

A. All except two girls that were on another shift and they left the place at 4:00 o'clock.

Q. Who was the person that was in charge of your department and if you know, the ukulele department?

A. It was Alma, Alma Swoboda.

Mr. Rotolo: Is there any question that she was a supervisor?

Mr. Fitzpatrick: I didn't understand she was at that time.

[fol. 207] By Mr. Rotolo:

Q. Did Mrs. Swoboda give orders in your department, direct the work?

A. Yes, she did.

Q. Did she do any work herself?

A. Well, I have seen her pick up a ukulele and fix a string.

Q. Did she do any regular routine work herself at the bench or anything like that? Like the other workers?

A. Is this before—how shall I say no——

Q. I am talking about November 10.

A. November 10?

Q. Yes.

A. I haven't seen her.

Q. Did you hear her giving orders and directions to the employees on what to do?

A. Yes.

Q. You remember that on this day Frank Ciccone was fired, you learned about that?

A. Yes.

Q. How did you hear about it?

A. Well, Virginia came up. She walked to the tool rooms and told us someone had been fired.

Q. What time was this, about?

A. 3:30, in the afternoon.

Q. She came up to your room, the finishing department?

A. Yes, there are two rooms, the ukulele room and the buffing room. She told us someone had been fired and that a meeting would be called later on.

About four o'clock, Alma got everybody together and she told us.

Q. Alma Swoboda?

A. Yes. She says——

Q. What do you mean everybody?

A. The employees from the buffing room and the ukulele department. That is considered the finishing department.

Q. Your department is known as the buffing room?

A. It is finishing the product.

Q. It is also known as the finishing department?

A. Yes. She told us Frank Ciccone had been fired.

Q. Where did all the employees get together, what room?

A. Ukulele room.

[fol. 208] Q. The people from your room went into the ukulele room?

A. That is right.

Q. How many were there altogether?

A. About 35 to 40. That is a rough guess.

Q. Who talked first after the employees were together?

A. Alma.

Q. What did she say?

A. She told us that Frank Ciccone had been fired for union activities. She said that Maccaferri is all fed up with the union so he fired the tool room for sticking up for Frank and the union. Then she says "We got a pretty good union which Virginia will tell you about." So later on Virginia told us we seen some of the contracts that 318 has and the contract itself is better than what we have with the old union, what we ever had.

Q. That is what Virginia said, right?

A. Yes.

Q. Virginia talked, too?

A. That is right. Then she went to say if you don't join this union, she says, you can't work here any more, and let the old union get you a job.

Q. Did she say anything else?

A. Not to my knowledge.

Q. Pardon?

A. Not to my knowledge.

Q. That is what you remember was said at that time?

A. Yes.

Q. Do you remember about three days before this happened that Mr. Maccaferri talked to you alone, personally?

A. Yes. It was a incident that reminded me of it, something happened that day, and right after the thing happened, he came over to me——

Trial Examiner Leff: When was this?

The Witness: Three days before Ciccone was fired.

By Mr. Rotolo:

Q. Three days before Ciccone was fired?

A. Yes. We were both together on the table and he says to me, he says, "Don't you think, Mr. Tommarello, that this union is pretty good?"

[fol. 209] Q. Which union?

A. 318. He said I think it is a very good union. I said that is your opinion, I told him. I didn't say anything else.

Q. After Alma finished talking and Virginia finished talking to the employees in the ukulele room, do you remember whether any of the employees walked out of the room at that time, did some of them walk out?

A. Not at that time.

Q. When did they walk out?

A. We went back.

Q. You went back to your rooms?

A. Yes, we went back to the rooms.

Q. Did any of the employees that you saw there, either in your department or the ukulele room go out before their quitting time?

A. Yes, they did.

Q. About what time did they start walking out?
A. About 4:00 o'clock.

Trial Examiner Leff: What was quitting time?

By Mr. Rotolo:

Q. Five o'clock, wasn't it?
A. The quitting time is five.
Q. Did you go out about four o'clock?
A. I did.
Q. When you went outside, did you see a lot of the employees out there?
A. I saw the picket line.
Q. Did you join the picket line?
A. I did.
Q. Did you picket after that?

Trial Examiner Leff: What time did you go out, at five?
The Witness: No, I went out at four.
Trial Examiner Leff: Why did you go out at four?
The Witness: Why?
Trial Examiner Leff: Yes.
The Witness: He fired the tool room, I says, we are probably next. Being we didn't give him our answer, we probably were next on the list for being fired since he had [fols. 210-211] fired the tool room, so naturally I walked out.
Trial Examiner Leff: Who told you he fired the tool room?
The Witness: Alma told us.

By Mr. Rotolo:

Q. Alma Swoboda?
A. Alma Swoboda.

. . . . . .

[fol. 212] TESTIMONY OF VIRGINIA O'NEILL

Q. Who had charge of the application cards, who kept them between Saturday and Monday?
A. I believe we split them up. Grace took a few. The other two girls didn't want any. We split them.

Q. That is Rose Amoroso and Vernai Gibson?
A. Yes.
Q. It was between you and Grace, is that right?
A. And Al Montopoli.
Q. Her husband?
A. Yes.
Q. On Monday, did you distribute any application cards for 318 in the plant?
A. I did.
Q. Did Grace distribute any cards, to your knowledge?
A. I wouldn't know.
Q. Did she bring any signed cards to you that day?
A. Yes, she did.
Q. During the day?
A. During lunch.
Q. During the lunch hour?
A. Yes.
Q. When did you distribute these cards, Miss O'Neill?
A. Before working hours.
Q. Before working hours?
A. Yes.
Q. In the morning?
A. On break and on lunch period.
Q. Your rest period?
A. Yes.
Q. And lunch period?
A. Yes.
Q. Is that right?
A. Yes.
Q. You were very careful not to do it on working hours, is that right? What is the answer.
A. Yes, I was very careful.
Q. You knew, as a shop steward, you shouldn't do that, is that right?
A. That is right.
Q. How many cards did you get signed on that day?
A. I don't remember.
Q. Did you get your 75 cards?
A. At the end of the day we had more than 75 cards.

* * * * * * *

[fol. 213-214] Q. So it was not as impossible as you thought, was it?

A. That is right.

Q. Were you surprised?

A. No.

Q. Did anybody else help you beside Grace and Al?

A. I only work in one department. I couldn't see what the others were doing.

Q. Do you remember an employee by the name of Peter Pieroni?

A. Yes.

Q. Did he help you get cards signed that day?

A. He signed up in the machine shop.

Q. He brought the cards back to you?

A. I believe so.

Q. Do you know when he got them signed?

A. No.

Q. Did you tell him not to get them signed during working hours?

A. No.

Q. Did you tell Mr. Pieroni what happened on Saturday?

A. Yes.

Q. Did you tell him about your conversation with Mr. Maccaferri?

A. I told him that Mr. Maccaferri knew what we had done.

. . . . . .

[fol. 215] By Mr. Rotolo:

Q. Do you remember now you solicited employees for the second shift molding during that half hour period?

A. I guess I must have.

Q. What took place at this meeting of 318 at the Bedford Park Restaurant?

A. The people became very enthused.

Q. How many employees were present, do you recall?

A. I believe we had almost 100 per cent.

Trial Examiner Leff: Of the shop?

The Witness: Yes.

By Mr. Rotolo:

Q. Can you estimate the amount, about how many employees that would be?

A. I wouldn't care to.

[fols. 216-217] Q. Would it be 50, 75 or 100?

A. About 100, say.

Q. You say, Mr. Pellay there and Mr. Cartagena from the second shift molding?

A. Yes.

Q. There were two others from the third shift molding, DeTuro and Angelo Bruno?

A. That is right.

Q. And you had asked them to go to that meeting?

A. I must have.

Q. Do you know whether Mr. Pellay and Mr. Cartagena were paid for the time they attended that meeting?

A. They were.

Q. Did you ask Mr. Maccaferri to pay them their time?

A. I believe I did, either I asked him or Mr. Zevin who was in charge of the personnel.

Q. Did they make any objection to it?

A. No.

Q. Mr. Maccaferri knew about this meeting?

A. I wouldn't know. Of course he must have known.

Q. Yes, you told him about it, didn't you?

A. That is right, to get the two representatives from the second shift.

Q. Did you continue getting cards signed during that entire week or did you confine your solicitation to Monday, October 23?

A. I believe the rest of the cards were signed at the meeting. Those who were not sure of 318 signed up that night.

[fol. 218] Estelle Sills, a witness called by and on behalf of the General Counsel, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your full name?
The Witness: Estelle Sills.
Trial Examiner Leff: And your address?
The Witness: 1760 Andrews Avenue, Bronx.

Direct Examination:

By Mr. Rotolo.

Q. You were employed by Mastro Plastics Company in November, 1950?
A. April, 1950. I was employed then in November.
Q. When did you start?
A. April 17, 1950.
Q. And what was the last day you worked there?
A. November, 1950.
Q. November 10?
A. About that time.
Q. Who was your forelady at the time that you——
A. Alma Zwoboda and Mrs. Maccaferri, both.
Q. Now, did you work in Mrs. Maccaferri's department?
A. The ukulele department upstairs.
Q. And did Alma also supervise the employees of that department?
A. She did.
Q. Did Mrs. Maccaferri have an office or a place, a desk, in that room?
A. Mrs. Maccaferri had a desk about four feet from me, about four feet away. It was right behind my table.
Q. Now, I direct your attention to Monday, October 23, 1950.
Do you recall having a conversation with Alma Zwoboda [fol. 219] and Grace Cincimino on that day?
A. Yes, I did have a conversation with Grace and Alma, both.
Q. What did Alma tell you?
A. Alma told me they were getting 318 to come in, and

that Mr. Maccaferri wanted the union, and would only give us what 318 asked for.

Q. Did she have anything in her hand, or give you anything?

A. Grace had cards in her hand to sign for 318. She asked me if I would sign one.

Q. Did Grace Cincimino say anything besides asking you to sign the card?

A. She told me Mr. Maccaferri sent her down to Local 318 to get all the information and the data on the union, and that is the union Mr. Maccaferri wanted in; he would give everything they asked for.

Trial Examiner Leff: Do you intend to develop what time this was?

Mr. Rotolo: Yes. This was on October 23.

Trial Examiner Leff: The time of day.

Mr. Rotolo: Yes.

The Witness: This was sometime in the morning during working hours.

By Mr. Rotolo:

Q. Now, do you remember on that day that a new girl came to work in your department?

A. Yes.

Q. And do you know this girl?

A. I didn't know her at the time she came in the shop. She worked two tables in front of me.

Q. And did you hear a conversation between Alma Zwoboda and this new girl on the first day she came in?

A. I was watching her and I saw Alma approach the girl. This was just about after I had been approached about signing for 318.

Q. What time of the day was this?

A. This was in the morning, too, just before lunch.

[fol. 220] And Alma approached the girl and she had cards in her hand, and she asked the girl, "In order to make it look good would you sign one of these cards for 318?"

Q. What did she say?

A. She said, "Would you sign one of these cards for 318 to make it look good in front of the other girls?"

Q. And did you sign a card for 318 that day?
A. Not that day. I signed it the next day.

. . . . . .

Q. Do you remember you attended a meeting that same week sometime at which the members voted to change their affiliation to 3127? Did you attend such a meeting?
A. Yes, I did.
Q. Did you sign a card in 318 that night?
A. I did.

Q. Now, you say you had signed with 318. Did you give up your membership in 318, did you cancel it?
A. I signed with 318, and then I thought it over and I thought it was kind of suspicious that Maccaferri should want this union and to give us all our demands, so I renounced my signature.
Q. When did you do that?
A. The following morning I did that. I renounced my signature and said I wanted my own union.
Q. How did you do that? Did you sign anything?
A. There was a fellow that worked in the shop, and during lunch hour he brought a petition around.
Q. During lunch hour?
A. Yes.
Q. Who was it?
A. Joe Cirillo.

Mr. Fitzpatrick: I move to strike "during lunch hour"; the witness did not so testify.
Trial Examiner Leff: Read the preceding answer.

(Lines 4 through 6, this page, read.)

[fols. 221-223] By Mr. Rotolo:

Q. Later that same week did you have a conversation with Alma Zwoboda and Grace Cincimino?

Trial Examiner Leff: Thursday of what week?
Mr. Rotolo: Thursday, October 23; the same week you signed the 3127——
The Witness: They both told me I was very foolish not

to go along with that union, and I was very foolish not to sign up with them and to stick with it.

By Mr. Rotolo:

Q. Did you tell them you had cancelled your membership in 318?

A. I did, and they told me if I didn't stick with them I would lose my job over it. So I wanted to know why.

Q. Who said that?

A. Alma and Grace.

Q. Alma or Virginia?

A. Alma told me.

Q. Alma Zwoboda?

A. Yes.

. . . . . .

[fol. 224] By Mr. Rotolo:

Q. I direct your attention to Friday, November 10, 1950, Miss Sills.

Did you hear a conversation between Mrs. Maccaferri and Grace Cincimino in your department that day?

A. Yes, I did. I was working in front of Mrs. Maccaferri. She was at her desk and Grace was with her.

Q. How far away is her desk from your place of work?

A. I would say to right where you are. My table would be right here.

Mr. Fitzpatrick: The witness seems to indicate about ten feet.

The Witness: Not quite that far.

By Mr. Rotolo:

Q. How many feet?

A. I would say about five feet.

Q. What time of day was this?

A. This was in the afternoon. This was in the afternoon, I believe.

[fol. 225] Q. Were you working at your desk?

A. Yes, I was.

Q. What did you hear at that time?

A. She was carrying on a conversation, and Mrs. Maccaferri said that Mr. Maccaferri had made up his mind as to the union he wanted, and that he wouldn't listen to any other one, wouldn't listen to reason about it, he would give the girls everything they wanted with this union, he would answer their demands.

Q. Did Grace say anything at that time?

A. Grace said that the girls were foolish for not going —not to listen to Mr. Maccaferri.

Q. Did you talk to either one of them at that time?

A. No, I didn't.

Trial Examiner Leff: I would like to find out what time of the day this was. I know it is in the afternoon, but I want to know whether it was before or after certain events occurred.

The Witness: I would say this was about, between 2:00 and 2:30, because I know it was before rest period. Mrs. Maccaferri came up to conduct some of her business there.

By Mr. Rotolo:

Q. Do you remember that same afternoon after four o'clock in the afternoon, or between 3:00 and 4:00 o'clock in the afternoon, anything unusual happened in your department?

A. Yes. We heard a rumor Frank was fired.

Q. When did you get these rumors, about what time?

A. About 3:30 I heard Frank was fired.

Q. Who did you hear it from?

A. I heard everybody talking about it, so I went over to Alma and asked her if it was so, that Frank was fired, and she said yes.

So I wanted to know more about it, and she said, "Frank was fired because of union activities in the shop; that he was all for 3127, and Mr. Maccaferri let him go, and in protest the tool room walked out with him."

Q. What happened after that?

[fol. 226] Mr. Fitzpatrick: I can't hear.

The Witness: In protest the tool room walked out with him, and they were fired, too, for walking out; Mr. Maccaferri fired all of them.

By Mr. Rotolo:

Q. What happened after that?

A. We decided to walk out with them; we were with Frank—we wanted our union, so we decided to go with them.

Q. Before you walked out, did you hear Miss Zwoboda talk to you or to the other employees present?

A. Alma called the employees into the ukulele department, the ones on that floor, and told them they were foolish for walking out; if they did they would lose their jobs over it. We wanted to know why we would lose our jobs.

Q. Did you ask Alma Zwoboda any question at that point, or make any statements to her?

A. I wanted to know if we walked out, why we would lose our job; what was the reason.

She said Mr. Maccaferri wanted 318 in, and if we continued to go with them, that he would fire us—we needn't bother coming back to work any more.

Trial Examiner Leff: Continued to go with whom?

The Witness: 3127.

By Mr. Rotolo:

Q. Did you punch out right away?

A. I punched out about twenty after four or 4:30.

Q. What is your quitting time?

A. Five o'clock.

Q. Did some employees punch out before you?

A. Quite a few left before me.

Q. Was there any discussion amongst the others that remained about what Alma Zwoboda said?

A. I know I wasn't listening too much to them. There was quite a bit of fuss about it, and they all decided to go out.

[fol. 227] Q. When you went out of the plant you saw a lot of employees outside the plant?

A. Yes.

* * * * * * * *

[ofl. 228] By Mr. Rotolo:

Q. While you were on the picket line, Miss Sills, did you have any conversation with Mr. Maccaferri at any time?

A. Yes. He was working in the yard; it seems one of the trucks broke down.

Q. Can you tell us approximately when this was after the strike began, or after this stoppage began?

A. I don't recall the date.

Q. Weeks after?

A. It was a day during the week.

Q. How many days after the people walked out, or how many weeks after, approximately?

A. I would say about four or five weeks afterwards. I know the strike was going on for quite a long time before. One of the trucks broke down, and Mr. Maccaferri was trying to get it fixed, along with the other ones, and then the gate broke, and he was working on it. We had a conversation with him and we asked him when he——

Q. Who is "we"?

A. There were several others with me. But I did, I asked him when he was going to settle, sit down with our [fol. 229] union and talk it over. And he said he would never sit down with our union; if we wanted to come back to work, to forget about our union, and he would take us back.

Q. Do you recall any occasion during the——

Mr. Fitzpatrick: By "our union" you understood him to mean what?

The Witness: 3127.

By Mr. Rotolo:

Q. Do you recall any occasion during this picketing period that you went to the office of Mr. Maccaferri?

A. Yes, I went in with Lillie Maddalena.

Q. Who is she?

A. One of the employees that worked with us. And it seems that——

Q. What was the purpose of your going to the office?

A. It seems it was time to collect Social Security, and she wanted to have her name changed from "Miss" to

"Mrs." to make it easier, and Mr. Maccaferri told her that to forget about the nonsense——

Q. She went in the office with you to get this record?

A. She wanted to get this record changed from "Miss" to "Mrs.".

Q. When you went in the office, what did Miss Maddalena tell him?

A. She explained that she wanted a change from "Miss" to "Mrs." to make it easier.

Q. Tell us what other conversation took place at that time between Mr. Maccaferri and Miss Maddalena in your presence?

A. It seems he told her to forget about the letter he sent discharging her, and he told her, "Forget all about it and give up 3127 and come back to work", he needs her.

Q. What did Lillie say?

A. Lillie said, "I won't give up my union. If you want me to come back to work you have to take me with the union, too."

Trial Examiner Leff: Can we have a date on this?

[fols. 230-231] By Mr. Rotolo:

Q. Can you tell us approximately when this happened after the employees walked out?

A. This was about nine weeks afterwards because it was just about the first week that we could start collecting unemployment.

. . . . . .

[fols. 232] By Mr. Rotolo:

Q. Alma Zwoboda said that the tool room employees had walked out, and Frank had been fired because of union activities for 3127?

A. That is right.

[fol. 233] Q. And what did she say after that? Did this statement about the breach of contract come after that or was it before?

A. It was during the conversation she told us it was against the contract, but we had already switched over to 3127, and she told us Maccaferri wanted his own union in,

318, and he would reach our demands, we would make a good salary. If we continued to stick with 3127—with our union; she put it that way, with our union—we would lose our jobs.

Q. Are you sure you remember her saying Maccaferri wanted his own union?

A. Oh, yes, I do.

Mr. Rotolo: That is all.

Re-cross examination:

By Mr. Fitzpatrick:

Q. Did you understand Alma when she said if you stick with your union, to mean if you went out on strike with 3127?

A. She said if we wanted to have our own union in, she said, we would lose our jobs. If we didn't want to lose our jobs, to take 318, Mr. Maccaferri's union.

Q. Did she make two statements about losing your job?

A. No, just the one. She told us——

Trial Examiner Leff: What was the one statement she made about losing——

The Witness: She told us if we walked out of the shop at that moment we would lose our jobs, we needn't bother coming back.

Mr. Fitzpatrick: No further questions.

Mr. Rotolo: That is all.

Trial Examiner Leff: The witness is excused.

(Witness excused.)

Trial Examiner Leff: Come to order, gentlemen. Will you call your next witness?

Mr. Rotolo: Ruth Shaw.

[fol. 234] Ruth Shaw was called as a witness by and on behalf of the General Counsel and, being duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Rotolo:

Q. Will you state your name?
A. Ruth Shaw.
Q. Where do you live?
A. 1419 Vyse Avenue, Bronx.
Q. Were you employed by Mastro Plastics up until November 10, 1950?
A. That is right.
Q. What department were you working in?
A. In the ukulele department, packing.
Q. The same department with Miss Sills?
A. That is right.
Q. How long had you worked in that department?
A. I was there about—in that department?
Q. Yes.
A. About six months.
Q. Do you remember around October of 1950, the week of October 23, were you solicited for membership in Local 318?
A. Yes, Grace Cincimino, I think her name is.
Q. Was it on a Monday?
A. I don't remember what day it was. I know it was in the morning, she came around with some cards for 318 to sign and——
Q. Were you at your bench at that time?
A. Pardon?
Q. Were you working at your bench at that time?
A. Yes, I was.
Q. Was Alma present at that time?
A. Yes.
Q. Did you have any conversation with Alma or Grace at that time?
A. I had—not when the cards were distributed, but during rest period, I went over to Alma. I hadn't signed the card when Grace had given it to me. I went over to

Alma and asked her whether—I mean if we should sign it and she said that it was a very good deal and all the foreladies and foremen, everyone would be in 318, they would also sign and we would get everything we wanted.

Q. You signed at that time, then?

A. After I spoke to her I signed.

[fol. 235] Q. At this time, what if you recall, was Alma's job? Do you remember what work she did?

A. It was like a forelady, she told us what to do and counted our work at the end of the day.

Q. Did she figure out your pay or any other function like that? The production?

A. Yes, the production, how much we made, what we did and what we put out.

Q. Were you ever transferred from one job to another?

A. Yes, occasionally, if there was nothing on packing, I would go downstairs.

Q. Who gave you the orders to do that?

A. I believe Alma did.

Q. Did you ever hear Alma during this period in October scold or criticize anybody for coming in late or for staying out in the ladies' room?

A. I don't recall that.

Q. Were you present on November 10, 1950?

A. Yes.

Q. Did you work on that day?

A. Yes, I was there.

Q. Do you recall that Frank Ciccone was fired?

A. Yes.

Q. When did you hear about it for the first time? What time of the day was it?

A. About 3:30, about 3:00 or 3.30.

Q. How did you hear about it?

A. Rumors, the whole plant was talking about it.

Q. Do you remember when these rumors started whether any employees walked out of the room?

A. No, no one walked out.

Q. Were you present when Alma Swoboda—did she talk to you and the other employees present?

A. That is right.

Q. How long was it between the time the rumors came

in of Frank's discharge and the time that Alma got the employees together and talked to them?

A. Alma spoke to us between 3:30 and 4:00.

Q. When had you heard about Frank's discharge?

A. About 3:30, around then. It was from 3:00 to 3:30.

Q. Tell us in your own words, if you can, as much as you can remember, what Alma said to the employees present at that time.

A. Alma had told us that Frank Ciccone had been fired [fol. 236] and that the whole tool room had walked out with him and if—I am a little nervous.

Q. All right, take it easy.

A. That is we walked out with 3127 we would all be fired, too.

Q. Did she mention any contract at that time?

A. Yes, she told us we were breaking the contract if we walked out with 3127. She told us either 318 or else you have to get out.

Q. She told you if you walked out you would be fired?

A. Yes.

Q. What was the rest of it?

A. She told us either you take 318 or you get out.

Q. Is that all she said?

A. That is all I recall.

Q. Did you go out right away?

A. We spoke among ourselves, I mean among the girls.

Q. What were the girls talking about after this speech was made?

A. We decided that we were talking about which union we wanted and we decided we wanted 3127, that we didn't want Maccaferri's union.

Q. That is when you walked out?

A. Then we all walked out.

Q. Did they all walk out together or in more than one group?

A. Approximately—we—about that time, after we had spoken.

Q. After you discussed it among yourselves?

A. Yes, we approximately all walked out the same time. Of course we got dressed, but around there about 4:30 I would say.

* * * * * * *

[fol. 237] LOUIS CASTALDO, was called as a witness by and sworn on behalf of the General Counsel and, being first duly sworn, was examined and testified as follows:

Trial Examiner Leff: What is your full name?
The Witness:: Louis Castaldo.
Trial Examiner Leff: Where do you live?
The Witness: 3120 Jerome Avenue, Bronx, New York.
Trial Examiner Leff: Bronx?
The Witness: Yes, Bronx.

Direct examination.

By Mr. Rotolo:

Q. Were you employed by Mastro Plastics Company in October or November of 1950?

A. Yes.

[fol. 238] Q. Do you recall during the month of October, 1950, during the latter part of the month, being solicited for membership in the union?

A. Yes, sir.

Q. Tell us when it was and by whom you were solicited?

A. It was about October 23. I came in to work as usual at 8:00 o'clock in the morning and Bill Ritacco, the foreman, stopped us near the molding machines and told us that the boss——

Mr. Fitzpatrick: May I have "us" identified?

By Mr. Rotolo:

Q. Whom do you mean by us?

Trial Examiner Leff: Who was with you?

The Witness: Bill Ritacco, the foreman, and other employees, I guess.

Trial Examiner Leff: Bill Ritacco stopped you? Where? Let us talk about you.

The Witness: Near the molding machine as soon as I came and punched my clock, he called us over to the molding room. He told us this was a very good union to join, and you would get all benefits and everything and the boss wants it. He said I myself even joined it. He said it was a good union. He said it was the boss' orders.

By Mr. Rofolo:

Q. Did you sign a card at that time?

A. I did.

Mr. Fitzpatrick: I didn't get the answer.

The Witness: I did.

By Mr. Rotolo:

Q. You say that was as soon as you got in and punched your card?

A. Right.

Q. Do you remember any of the other employees?

A. Tony Migliore, a friend of mine who is employed at Mastro Plastics. He came right behind me. He signed in, too.

[fol. 239] Q. Did Ritacco give him a card at that time?

A. Yes, I guess they were catching them all as they would come in.

* * * * * * *

MORRIS BRENDER, was called as a witness by and on behalf of the General Counsel and, being first duly sworn, was examined and testified as follows:

Trial Examiner Leff: What is your full name?

The Witness: Morris Brender.

Trial Examiner Leff: Where do you live?

The Witness: 178 Nostrand Avenue, Brooklyn.

Direct examination.

By Mr. Rotolo:

Q. Were you employed by Mastro Plastics Company in October and November of 1950?

A. Yes.

Q. What work do you do?

A. Ejection molding machine operator on the second shift.

Q. What hours?

A. 3:30 to 12:00.

Q. Do you recall sometime in October of 1950 being solicited for membership in a union known as Local 318?

A. Yes.

Q. Who asked you to join it?

A. Virginia O'Neill and Al Montopoli.

Q. When did that take place?

A. Just as we were entering the molding room ready to go to work.

Trial Examiner Leff: On October 23?

A. I am not sure, I believe it was.

By Mr. Rotolo:

Q. It was during October?

A. Yes.

Q. You punched your time card when you went in?

A. Yes.

[fol. 240] Q. Did you remain as a member of 318?

A. I never signed the card.

Q. You never joined that union?

A. No.

. . . . . .

Q. All right. Do you recall on November 10, 1950, when Frank Ciccone was fired—

A. I heard about it.

Q. Do you remember on that day, that night, Mr. Maccaferri came to your room, the molding department room, and he talked to the employees present?

A. Yes.

Trial Examiner Leff: Who came?

The Witness: Mr. Maccaferri and his wife.

Trial Examiner Leff: What time?

The Witness: Just before we were ready to knock off from work.

Trial Examiner Leff: That was what time? Close to 12?

The Witness: Close to 12.

Trial Examiner Leff: Midnight?

By Mr. Rotolo:

Q. Tell us as best as you can, what Mr. Maccaferri said to the employees at that time.

A. When we were ready to knock off from work, Mr. Maccaferri called us together in a group and he said, "I understand you fellows want 3127." He says, "They are a bunch of phonies and a bunch of crooks and I won't have anything to do with them. If you want to work here, take 318 or else you have no more job. It is up to you. If you want 318, swell. If you want 3127, you are out."

Q. Did he say anything about the contract at that time? Do you remember any reference to the contract or to the notice he had posted?

A. No.

Q. You don't recall that?

A. No.

Q. How long did he talk?

[fol. 241] A. He talked quite a while. As a matter of fact, we were supposed to go home and we should have gotten paid for all the time he was talking.

Q. You went over the quitting time?

A. We certainly did.

Q. What was he saying all this time?

A. He said what I just told you, that he won't have anything to do with 3127 because they are a bunch of phonies, a bunch of crooks, and he would like to have 318 come in and it was up to us.

Q. Is that the substance of what he said?

A. Yes. His wife tried to put in her two cents also, but he shoved her aside. He said "You keep quiet; let me do the talking."

Mr. Rotolo: That is all.

Just a minute, I have another question.

By Mr. Rotolo:

Q. Did you come back to work on the following day or the following Monday?

A. No.

Q. Did you come to the plant on Monday?

A. Yes, I didn't go inside.

Q. What did you do when you got there?

A. All the people were outside walking up and down so I joined them.

Mr. Rotolo: That is all.

I have just one more question.

By Mr. Rotolo:

Did you have any conversation with Mr. Maccaferri after the picketing started?

A. After it started?

Q. Yes.

A. It was on Christmas night.

Q. December, 1950?

A. He was ready to go into the plant. We said "Merry Christmas, Mr. Maccaferri," and he said Merry Christmas to us. He said "You people still around here, huh? You don't know what is good for you."

He said "As far as I am concerned, I am liquidating my business, I lost." That was a lie. He didn't liquidate his business.

[fol. 242] Mr. Fitzpatrick: Motion to strike.

Trial Examiner Leff: Granted.

The Witness: What is that?

By Mr. Rotolo:

Q. Just tell us what he said.

A. He didn't liquidate his business.

Q. What ~~else~~ did he say at that time?

A. As far as I can recall, he said, "Why don't you people get smart to yourself and come back to work and forget about 3127 and I will give you back your Christmas bonus," and we told him, "We will be here until you are ready to see our way with 3127. That is the union we want."

Q. What did he say to that?

A. He walked inside and slammed the door.

STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF MARCH 17, 1952.

ALMA ZWOBODA, a witness called by and on behalf of the Respondents, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your name?
The Witness: Alma Zwoboda, Z-w-o-b-o-d-a.
Trial Examiner Leff: And where do you live?
The Witness: 3038 Hull Avenue, Bronx, New York.

Direct examination.

By Mr. Fitzpatrick:

Q. Mrs. Zwoboda, you are employed by Mastro Plastics Corporation?

A. Yes.

[fols. 243-244] Q. And you are a supervisor in the finishing department?

A. Yes.

Q. Which includes the ukuleje and the shoe form departments referred to?

A. Yes.

Trial Examiner Leff: Are you going to find out how long she has been a supervisor?

Mr. Fitzpatrick: Yes.

By Mr. Fitzpatrick:

Q. How long have you occupied a supervisory position?

A. It was either May or June of 1950 that I became a supervisor.

Mr. Fitzpatrick: Counsel at this point will concede that on October 23, as well as in November, Mrs. Zwoboda was a supervisor.

. . . . . .

[fol. 245] Q. I want to bring you up to the tenth of November. Do you recall that was the day on which there has been testimony there was a strike or a walk-out of some sort?

You were present in the plant that day, were you not?

A. Yes.

Q. Working in your regular department?

A. Yes.

Q. Will you tell us what occurred toward the end of the shift in the afternoon?

A. Well, the people were working as usual, and one of the [fols. 247-247] little boys that was working on the—making the cartons for packing ukuleles by the name of Carlo, had gone——

Mr. Rotolo: What is the name?

The Witness: Carlo.

—had gone to the back of the department to get some of these cartons and he was called to the window by Frank Ciccone and Pete, and he was asked to call Tammy—we call him "Tammy"; I imagine his name was Tamarello—to the window.

And when I saw Tamarello leaving the buffing room and walking through the ukulele department, I followed him, and Frank and Pete called up to him and told him to bring everybody out; they were out on strike. And he walked back through the department and just simply told all the girls, he said, "Come on, this is it."

And everybody got up right then and there and left all their work just as it was and walked out.

By Mr. Fitzpatrick:

Q. When you say "everybody", were there any others who remained?

A. There were just a few people who remained.

. . . . . .

TESTIMONY OF VIRGINIA O'NEILL

[fol. 248] By Mr. Fitzpatrick:

Q. After you had gotten all the cards what did you do with them?

A. There were some delegates from 318 outside the shop, had been all day, and on my lunch time I brought quite a few of them out there.

Trial Examiner Leff: I want to get something clear. You mentioned before, Mr. Rotolo, that 318 intervened in the proceeding filed by Local 65 on October 24. Is that right?

Mr. Rotolo: October 23.

Trial Examiner Leff: On October 24 they brought in the cards?

Mr. Rotolo: Yes.

Trial Examiner Leff: What happened on October 24? You say they intervened.

Mr. Rotolo: In my chronology I have "about October 24." At that time I didn't know the exact date.

Trial Examiner Leff: Was there a hearing or a conference or anything on October 24?

. . . . . .

[fol. 249-250] Mr. Rotolo: No. There was a conference called later on, but that was the date they brought the cards in, October 23. When I mentioned the 24th before I was reading from a chronology I had made up which placed it around that date, but later on I found out the exact date was October 23.

. . . . . .

[fol. 251] Mario Maccaferri, a witness called by and on behalf of the General Counsel, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your full name?

The Witness: Mario Maccaferri.

Trial Examiner Leff: Where do you live?

The Witness: 24 Redfield Street, Rye, New York.

Direct examination:

By Mr. Rotolo:

Q. Mr. Maccaferri, are you president of Mastro Plastics Corporation and French-American Reeds Company?

A. Yes.

Q. How long have you been president of those companies?

A. Since the corporations were formed.

Q. When was that?

A. Mastro in 1945, and French American Company in '46.

[fol. 252] Q. And you have had charge of labor relations of these two companies right along, have you not?

A. No.

Q. Who had charge of them at any other time?

A. Mr. Zevin.

Q. Who is he?

A. He was my labor relations man.

Q. When did you hire Mr. Zevin?

A. I think about 1948. Before then I was in charge, with the exception of when we originally started to negotiate with this union, that I had a lawyer by the name of Salli and a personnel man by the name of Metzger.

Q. During the period Mr. Zevin was in charge of your labor relations, did you take any part in the labor relations matters dealing with your employees?

A. Yes, I did.

. . . . . .

Q. Now, then, do you recall that sometime in August of 1950 a campaign was started by another union, Local 65, to organize your employees?

A. Yes. This was brought to my attention.

Q. Who brought it to your attention, Mr. Maccaferri?

A. I don't remember, because it might have been any one of one hundred people.

Q. And what did you do about it? Did you do anything at all?

A. Right away I didn't do anything, except after I understand they were succeeding in getting a certain amount of inducement.

At that time I called up Mr. Saul and I asked him if he was acquainted that Local 65 is trying to take away the shop from him. He told me that he heard about it, and he is very much concerned.

. . . . . .

[fol. 253] Q. Before you continue with that, had you, prior to that time, been in communication with a Mr. Tonelli, of Local 318?

A. No.

Q. Hadn't you been referred to Mr. Tonelli by some person that you knew?

A. During a meeting of my corporation, the directors—I expressed my concern about this activity of Local 65.

Q. When was this meeting of the Board of Directors?

A. The meeting was—I can find the date because it was a regular company meeting. I don't remember the date. I will find out. I don't remember the date offhand.

Q Can you fix it approximately? Was that in the early part of October?

A. I think I could fix it toward the end—I am not sure—toward the end of September, but I can find it exactly when it was.

So, during this meeting I expressed my concern about this labor relations situation.

Q. About 65, you mean?

A. No, in general. Our contract is open for negotiation. There was a demand for 12½ cents an hour, which is quite substantial, and under the present condition of this corporation——

Trial Examiner Leff: I hate to interrupt you.

According to my notes—which, of course, may be in error—you testified before that during a meeting with the directors you expressed concern over Local 65.

The Witness: Yes.

Trial Examiner: Is that the same meeting?

The Witness: Yes. I expressed concern over 65. But I started to talk about the demand, and I said, "On top of that we have Local 65 trying to come in. I don't know how [fol. 254] my union and my people will react against it, but it seems to me we might be heading for labor troubles."

One of the directors suggested I go and see a friend of his that has a certain amount of knowledge about unions, and he might tell me what best to do.

I went to see this person.

By Mr. Rotolo:

Q. Was that the man who is connected with the plastering industry?

A. Yes. I do not wish to mention his name.

Trial Examiner Leff: Which man is connected with plaster industry—the director?

The Witness: No.

By Mr. Rotolo:

Q. The intermediary, the one who introduced you to Mr. Tonelli?

A. He said, "Well, there isn't much I can do, but I know Mr. Tonelli and I would like you to meet him. This man is not the usual union leader", he told me, "who wants to grab every shop that he hears about."

Trial Examiner Leff: Just a moment. Who told you this, the intermediary?

The Witness: Yes.

"I think this man can tell you what you can do about all this; because he has had a lot of experience with Local 65."

And in this spirit I went to see Mr. Tonelli.

By Mr. Rotolo:

Q. Before you go on, Mr. Maccaferri, were you interested in keeping Local 65 out of your plant?

A. Definitely.

Q. Why?

A. Because, from the opinion of my people, they don't want Communists, and from the opinion expressed in all newspapers, labor newspapers, 65 are Communists, and [fol. 255] from the opinions expressed to me by Mr. Saul, Mr. Rothenberg. If that is not enough for any employer to come to a decision I don't know what he shall have.

. . . . . .

Q. All right. Tell us about this man that referred you to Mr. Tonelli.

A. I went to see Mr. Tonelli and I told him my troubles. I said, "Look, I don't know what you can do. I am not coming here to you for any direct help, simply that Mr. So-and-so thinks you can tell me something, at least satisfy my apprehension."

"What exists?"

And I told him about Local 65.

Mr. Tonelli got up from the back of his desk and he said, "This people here will murder you."

And he started to tell me about his experience with National Container. And he said, "We beat them, and they are willing to apologize in the front page of their newspaper for all the insults they gave us."

After Mr. Tonelli explained to me all this, I left him. I didn't promise him anything. I didn't ask him anything would he be interested in my shop, or whether I did know anything, except Mr. Tonelli was the vice president of this A. F. of L. By the way, after I learned Mr. Tonelli, one of his locals, had a contract with one of my competitors, and that very contract—I had a copy supplied to me—is the one they gave Mr. Saul they were willing to sign.

Q. You knew that Mr. Tonelli's Local 318 had a contract with Banner plastics; is that right?

A. I learned it there. I knew it was an A. F. of L. Local, but I didn't know Mr. Tonelli had anything to do with 318.

. . . . . .

[fol. 256-257] Q. Just answer the question. Were you interested in finding out how strong——

A. Just how many people signed with 65?

Q. Yes.

A. I knew a certain amount of people signed, and that——

Q. How did you know that?

A. In a plant there is such things as friends, people that like you because of what you are, not because you are the boss. They told me this happened, and so and et cetera. Call them "reporters", but I don't think it's the case in my plant because we don't encourage anything like that.

Q. Was Virginia O'Neill one of these friends?

A. She is a very good friend of mine. So is Alma Zwoboda. She was in the committee of the other union. So is everybody else in my plant. I think I have a lot of friends.

Q. And they are the people who tell you what is going on?

A. Not necessarily. It has to happen casually because

there is no such thing as calling a meeting or asking them or people that are anxious to come in and tell me anything. I have no time——

Q. Didn't Miss O'Neill and Grace Cincimino tell you they had been to a meeting of Local 65?

A. They might have, but I don't know when and why.

• • • • • • • •

~~[fol. 258]~~ Q. Do you know of any meetings that Tonelli conducted in a room that was part of your building or plant but not used for manufacturing purposes?

A. I wasn't there. I understand a meeting was conducted but that day I wasn't in New York; I was out of town.

Q. You heard about it?

A. I heard about it.

Q. Did you investigate the situation?

A. It was done, it was done.

Q. Who told you about the cards being signed on Monday after they were signed? Did anybody tell you anything about that?

A. Oh, yes, but I don't know who told me.

Q. Did Virginia O'Neill come to you and tell you she had signed up 75 or 100 cards that day?

A. I don't remember to have seen Virginia that morning, but somebody else told me.

Q. Let's see if this will refresh your memory again.

On page 9 of your statement, General Counsel's Exhibit 15 for identification, bottom of the page, you said, "On Monday after the Saturday that the girls visited 318 after lunch, I understood that about 115 people had signed up with 318. The cards were given to the representatives of 318 outside the plant. I was informed of this by Virginia O'Neill."

You remember that now?

A. It must have been that.

Q. Do you recall it?

A. I don't recall it now. If I said that at that time that is the truth. It was near. It is eight, about six months ago, and at that time my memory was much more accurate than today.

Q. This statement was sent to you on April 10, 1951, shortly after that.

A. A year.

. . . . . .

[fol. 259] Q. After the incident happened.

A. That is right.

Q. You say this would be——

A. Accurate.

Q. More accurate than your present recollection?

A. I wouldn't dare to contradict it because at that time everything was so clear.

Q. Between October 23 and November 10 did you have any discussions with Mr. Saul about a new contract, or with Mr. Rothenberg?

A. Between what?

Q. October 23 when these cards were given out in the plant, and November 10, when the strike, or the alleged strike, took place.

A. Yes, I recall particularly one. I don't think there was any other. Saul called me on the phone the day before the strike and he told me, "Mario, I have succeeded in signing up a certain amount of your people with 3127."

That day I didn't know 3127 from a mountain, didn't know what it was. My memory didn't say anything.

Q. You remember that was the union that first had a contract?

A. I didn't remember that day.

Q. You didn't remember?

A. No.

I said, "Well, what do you want?"

He said to me, "We want to come in and sign a contract."

I said, "How can you sign a contract when you, yourself, told me a few days ago that nothing can be signed so long as there are charges, or petitions, filed with the National Labor Board? I don't know anything about those things."

"Well," he said, "if this is the way you feel——"

I said, "I don't know."

He said, "I thought we might sign a contract, anyway."

I said, "Look, Saul, I don't know what there is to be done. I have a lawyer. Get in touch with him."

At that time I still had Mr. Shipman, who was in Washington, as a labor lawyer.

So he told me, "Well, if this is the way you feel, forget about it."

[fol. 260] That's all he told me.

That was the day before the strike.

Q. Now, Mr. Saul testified, and several other witnesses testified, that on October 25—that is two days after the cards for 318 were distributed—they had a meeting, the union committee had a meeting with you at which they presented the demands which included the 25-cent wage increase, welfare fund and the other changes. Do you recall that now?

A. I think so. I might be in error. But it seems to me now that there were two meetings, one that they made the demand of 25 cents—first, we had a meeting where they demanded 12 cents.

Q. That was in the latter part of September or October?

A. October.

And then there was another meeting where they said, "Now we want 25 cents."

Q. And that is when they told you about 3127, wasn't it?

A. No.

Q. Not yet?

A. No. It never came out.

Q. The first time you heard about 3127, you say, was the day before the walk-out?

A. That's all. I didn't even know what it was, 3127. I realized it after, following all the happenings I realized that they were trying to sign up people in 3127 a few days before the strike. But I didn't know what it was that day.

Q. You knew there was activity around your plant for signing up employees for 3127?

A. I put it together after in my mind, but when this activity was around the plant I thought it was the activity of 22045, because I have never had anything to do with 3127. I know that originally 3127 came down, but lately there was never talk about 3127.

Q. In fact, didn't you suspect Frank Ciccone was going around to the employees——

A. Frank Ciccone was more than suspected. He was wasting all his time, bothering everybody. I didn't know for what, I mean it.

Q. Was it for 3127?

A. I don't know it, and I thought it was for 22045.

. . . . . .

[fol. 261] Q. Now, Frank was a good worker, wasn't he?

A. Yes, they were all good workers.

Q. He has been there with you for a long time?

A. That is right.

Q. So for that one instance he left the machine shop that morning, or that afternoon, on November 10, you had him fired, is that right?

A. No, it isn't exactly that. There was a question of insubordination. It was apparent there was a spirit of: "To hell here, we are the boss here, and not him, and I am going to go along regardless of what he told me", because he was told before to finish this nonsense.

Q. Wasn't this union unrest having anything to do with this attitude you had?

A. Me?

Q. Yes, did that have anything to do with it?

A. I had only one desire, really: to see them quiet, finished, and I was willing to do anything to help them.

The funny part is this: You asked the question: "You would have done anything not to have 65."

Besides the reason I didn't want any Communist union in my plant, I don't think that there were three per cent of my people in my plant who wanted 65. That is another reason why.

Q. You didn't want any racketeer union in your plant, isn't that right?

A. Do you like racketeering?

[fol. 262] Q. I am asking you.

A. I don't like racketeers, too. The same thing as Communist, racketeer is the same thing.

Q. The same thing?

A. Absolutely.

. . . . . .

[fol. 263] Q. Now, when you got reports that Frank Ciccone was disturbing the girls, did you go and talk to any of the girls to find out what he was doing in talking to them?

A. No.

Q. Did your wife show you production figures, whether they were more or less than usual?

A. She didn't because simply the production didn't come out. After all, there are containers that come out every few minutes, and you didn't see them coming out.

Q. And you were interested in anything that might affect production, isn't that right?

A. That is right, against anything that affects production.

Q. So you had a talk with your wife about this loss of production in the packing room, is that right?

A. Yes.

Q. And she told you it was because Frank Ciccone was bothering the girls?

A. "Frank Ciccone was always there repairing those machines." That is what she told me.

Q. And you took from that that he was bothering the girls?

A. No, I didn't take it from that. I went there myself and I saw Frank Ciccone—chi-chi-chi—talking with one and the other, and he had cards in his pocket, put them in his pocket. I said, "What's going on?"

[fol. 264] Q. You did see him with cards in his hand and put them in his pocket?

A. I don't know whether they were cards or what. I seen some commotion.

Q. What time of the day was this you saw him?

A. I would say around 10:30—11:00 o'clock in the morning.

Q. November 10?

A. Yes.

Q. The day he was fired?

A. That is right.

Q. Did you ask him what he was doing?

A. No. I simply asked him one thing, "Please get over what you have to do and go in the tool room."

Q. And then that's when you told him to stay in the machine shop?

A. No.

Q. When?

A. I came back again after half an hour. I still find him there. I stopped and looked and went through without saying anything. When I came back he is still there.

Q. You didn't see him giving out any cards then, did you?

A. I didn't see any cards. I see him with something, and he put it in his pocket. I don't know what it was. I assume they might have been cards. I wasn't interested to know. I was getting fed up with this situation, and I told Ciccone to stop and go work on his bench and just attend to his work.

Q. At two o'clock, you say, or about two o'clock, just before you went out of the plant, you told him to stay in the machine shop?

A. That is right. I went in the machine shop.

Q. And then you got a call from your wife; is that right?

A. I got a call, I think, from Mr. Zevin. I talked to my wife, too.

Q. You were at the board of directors' meeting?

A. That is right.

Q. And there was a call from your wife first, and then you got on the wire with Mr. Zevin, isn't that right?

A. I think so.

Q. And that is when you gave the orders for Frank to be fired?

A. Yes.

[fol. 265-266] Q. What did they tell you at that time about Frank?

A. He said, "Mr. Maccaferri, this situation doesn't stop. Ciccone is around the plant—they were three—walking like storm troopers."

Q. Did she say who the three were?

A. Yes. That was——

Q. What did she say? Or Mr. Zevin?

A. Peter Pieroni and Carmen Libutti, I believe.

I said, "I instructed Ciccone to stay at his place. He did the wrong thing getting away. Give him his check, period."

[fol. 267-269] MARIA MACCAFERRI was called as a witness by and on behalf of the Respondents and, being first duly sworn, was examined and testified as follows:

Trial Examiner Leff: What is your full name?
The Witness: Maria Maccaferri.
Trial Examiner Leff: Where do you live?
The Witness: 24 Redfield Street, Rye, New York.

Direct examination

By Mr. Fitzpatrick:

Q. Mrs. Maccaferri, you are the wife of Mario Maccaferri who is the president of Mastro Plastics, are you not?
A. That is right.
Q. Are you also an officer of Mastro Plastics Corporation?
A. That is right.
Q. Which office do you occupy?
A. Vice-president.
Q. Are you an officer of French American Reeds Corporation?
A. That is right.
Q. Which officer?
A. The same.
Q. In actual practice you supervise around the plant generally, don't you?
A. That is right.
Q. Particularly in the packing room?
A. Yes.

. . . . . .

[fol. 270] TESTIMONY OF GRACE CINCIMINO

Q. You say this meeting at which everybody signed over to 3127 took place two or three days before the strike?
A. I think it was then, yes.
Q. Are you sure of that?
A. I am not sure. That is why I say one or two days. I know it was before then. Exactly the day, I don't know.

[fol. 271-272] Q. Could it be ten days before or two weeks?

A. I couldn't say. It was a short time.

Q. It might be two weeks?

A. I wouldn't say two weeks.

Q. It might be ten days?

A. Ten days is close to two weeks. It is a matter of a few days.

Q. It couldn't be ten days?

A. I am not sure. I don't remember. I know it was a short time that it happened.

Q. You are not sure whether it was two days or three days?

A. No. The day I can't tell you.

Q. So when you said on direct examination that two or three days before the strike we had a meeting, you are not sure of that, are you?

A. No, I said I wasn't sure of that.

Q. You say at that meeting something was said about a strike but you weren't sure whether it was a strike vote—was it a strike vote that was taken at that time?

A. I wouldn't say a strike vote. I am not too sure. There was supposed to be another meeting, I think, on a Monday, the following Monday, to have the strike vote.

Q. They were going to have a meeting on Monday to decide whether they were going to have a strike?

A. I think so.

Q. That is it, isn't it?

A. I think it is.

[fol. 273] MAX STUDLI a witness called by and on behalf of the Respondents, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your full name?

The Witness: Max Studli.

Trial Examiner Leff: Where do you live?

The Witness: 3 Highland Avenue, North Tarrytown, New York.

Direct examination

By Mr. Fitzpatrick:

Q. Mr. Studli, you are employed by Mastro Plastics Corporation?

A. That is right.

Q. And you are foreman of the machine shop and tool room?

A. That is right.

Q. In about October and November, 1950, Frank Ciccone was working under you?

A. That is right.

Q. And Peter Pieroni?

A. That is right.

Q. And Carl Libutti?

A. Yes.

Q. And several others?

A. Yes.

Q. Including John Balko?

A. That is right.

[fol. 274] Q. Will you describe Frank Ciccone's work for us, what was he regularly to do?

A. He was making mold parts and he had another job which was fixing and adjusting clothes pin assembly machines in the packing room.

Q. What was Pieroni's job?

A. He was a toolmaker, mold maker.

Q. That mold-making operation is all done in the machine shop itself, isn't it?

A. Yes.

Q. Now, do you recall the day of the strike or walk-out?

A. Yes.

Q. On November 10, 1950?

A. Yes, I do.

Q. Tell us as closely as you can recall what happened on that day.

A. Approximately in the middle of the day, in my presence, Mr. Maccaferri told Frank Ciccone not to go down to the packing room any more. That was an order. And he told me not to let him go down, to send him down there any more.

Q. What happened after that?

A. Then later on in the day I received a telephone call from the outside by Mr. Maccaferri to immediately discharge Frank Ciccone.

Q. What did Mr. Maccaferri say in the telephone call other than what you have told us?

A. Well, if I recall right, he said he went to the packing room, anyway, contrary to his instructions.

Q. What did you do after you received the telephone call?

A. I told Frank Ciccone that he was discharged and he should leave right away.

Q. What words did you use to him when you told him he was discharged?

A. I told him that he was discharged, in these words.

Q. Did you say anything else to him? Did you tell him the reason?

A. I am not sure whether I told him the reason.

. . . . . .

[fol. 275] Cross-examination:

. . . . . .

Q. Didn't some employees tell you that there was a union they wanted to bring into the plant other than the union that had a contract with the company? Some employees told you that, didn't they?

A. Some employees, no.

Q. Did you ever have a conversation——

A. Wait a minute. One employee, I recall, told me that Mr. Maccaferri wants to bring in another union.

Q. Who is that?

A. That is Peter Pieroni.

Q. When was this conversation with Peter Pieroni? How much before Frank's discharge?

A. It was around this time, between weeks.

Q. A week or two weeks before?

A. Maybe.

Q. Now, did you know whether Pieroni and Ciccone, or either one of them, were anxious to keep the Carpenters' Union or get the Carpenters' Union in the plant? Did you have any conversation with him about that?

A. I believe those boys liked to stick to their own union.

Q. And they told you that they didn't like the idea of Mr. Maccaferri wanting to give them his union? Isn't that the way they put it, something to that effect?

A. I believe they said, Pieroni said, that they would like to stick to their own union.

Q. Ciccone was there, too, wasn't he, at the time?

A. I don't know. I don't remember.

Q. You knew that Ciccone was active at that time on behalf of this Carpenters' Union, getting members for it? You knew that, didn't you?

A. No. I have been told that only that very day, probably a couple of hours before he was discharged.

[fol. 276] Q. You heard that from around the plant? How did you know it?

A. Somebody told me he was agitating for——

Q. The Carpenters' Union?

A. No, for account of union business.

Q. Agitating for union membership, is that right? Union business, as you say?

A. Union business.

Q. Was that the same day, November 10, when he was fired, that you heard this?

A. I heard it the first time, that is right.

Q. Did you call Ciccone in and tell him he shouldn't do that?

A. No.

Trial Examiner Leff: Whether they were entitled to a rest period or not, during the course of the day did they ever leave the machine shop to go to the Coca Cola machine to get refreshments? Do people in your shop ever do that?

The Witness: If they ever did they would be back right away, or do it individually, not all at one time.

Trial Examiner Leff: Suppose a man left for a Coca-Cola and came back within ten minutes. Would you take notice of that?

The Witness: No.

Trial Examiner Leff: You mean you wouldn't think there was anything wrong about that?

The Witness: I would only take notice if all of them together would take that rest period. On this day two or three didn't, but when four went out I looked around and I missed more than half of the men. That's when I noticed, see?

[fol. 277] By Mr. Rotolo:

Q. How long had you been a foreman of Mr. Ciccone, Mr. Studli?

A. How long I was a foreman?

Q. Mr. Ciccone?

A. Frank Ciccone?

Q. Yes.

A. Frank Ciccone? All the time he was employed there.

Q. That was several years, isn't it? 1946——

A. That is right.

Q. And did you ever find any fault with his work?

A. No, I was satisfied with him.

Q. Did you ever have any reason to discipline him?

Mr. Fitzpatrick: Let the witness finish.

The Witness: He learned a lot with us under me. When he started with us he was not a first-class toolmaker or machinist. But by the time he left he was a pretty good man in the trade.

By Mr. Rotolo:

Q. You considered him a good worker, didn't you?

A. Yes.

Q. And he was conscientious in his work?

A. He was conscientious in his work.

Q. Did you ever have to criticize or scold him for staying away from the machine shop too long?

A. No.

Q. So on this day, November 10, when, if you recall, did these three men leave the machine shop?

A. I didn't notice them leaving it. I only noticed they were not around.

Q. Do you know what time they came back?

A. And a few minutes later they came back again.

Q. A few minutes?

A. A few minutes after I noticed it. How long they were gone by the time I noticed it I don't know.

[fol. 278] Q. Were you continuously in the machine shop that afternoon around that time?

A. During that time they were out I was in the machine shop.

Q. You say you didn't notice when they left?

A. No.

Q. You don't know what time they left?

A. That is right.

Q. It could have been five minutes to three?

A. It could have been five minutes to three.

Q. You noticed them coming back, didn't you?

A. That is right.

Q. Did you look at your watch to see what time it was when they came back?

A. I didn't look at the watch, no.

Q. There was nothing unusual about the men going out of the room except three of them went out at one time; is that right?

A. That is right.

Q. If it weren't that all three left there would be nothing unusual about it?

A. If one or two left I wouldn't even notice it.

Q. In fact, all three leaving at one time——

A. It was four. At that time I had seven men, I believe, and four left.

Q. Who were the four——

A. At least four.

Q. Who were the four men that left?

A. Frank Ciccone, Peter Pieroni, Libutti, and the fourth one, I believe, was Balko.

Q. Who? Balko?

A. Balko.

Q. Now, it is your job, Mr. Studli, to supervise the men in the machine shop and see that they do their work, isn't that right?

A. That is right.

Q. So when you first noticed that four men were missing from your machine shop, what did you do? Did you investigate to find out what happened?

A. Yes, I did.

[fol. 279] Q. Did you go out of the machine shop?

A. No.

Q. What did you do?

A. I asked one of the remaining men where the others were.

Q. Yes.

A. And he told me they went down to the packing room for a drink.

Q. And did that satisfy you?

A. That didn't exactly satisfy me.

Q. What else did you do?

A. Nevertheless, I stood in the machine shop.

Q. You didn't go out?

A. I had a very important job to do myself and waited.

Q. You didn't go out?

A. Sure enough, a couple or three minues later the men appeared.

Q. You didn't go out looking for these men yourself outside the machine shop?

A. No.

Q. Or call them back?

A. No.

Q. When they came back in the machine shop did you question them as to where they had been?

A. I don't think I did question them. I believe, however, one of them told me that he just took the rest period which

they were entitled to take, and I never, up to that date, knew that they were entitled to take a rest period.

Q. Did you dispute that fact at that time, that they were entitled to a rest period?

A. No. They said it was in their contract. I believe.

* * * * * * *

Re-direct examination:

* * * * * * *

Trial Examiner Leff: Just a moment.

When Mr. Maccaferri told you about a couple hours before Ciccone's discharge that Ciccone was not to be per- [fol. 280] mitted to leave the machine shop, or the tool room, whatever it is called, did he tell you why?

The Witness: No, he didn't tell me.

Trial Examiner Leff: Did you ask him?

The Witness: No.

Trial Examiner Leff: Did you point out to him that Ciccone, when called, would go in the packing room to fix these clothes pin machines, or did Mr Maccaferri know that?

The Witness: He knows it.

Trial Examiner Leff: And you say Mr. Maccaferri made no comment to you as to why he was giving that order?

The Witness: No, he didn't.

Trial Examiner Leff: Didn't that order seem rather unusual to you, or did it seem usual?

The Witness: Well, it was an unusual sort of order, but somehow I knew there was some trouble.

Trial Examiner Leff: What trouble?

The Witness: I mean union trouble.

* * * * * * *

[fol. 281] WILLIAM ANTHONY RITACCO a witness called by and on behalf of the Respondents, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your full name?
The Witness: William Anthony Ritacco.
Trial Examiner Leff: Where do you live?
The Witness: 43 Beachwood Avenue, New Rochelle, New York.

Direct examination.

By Mr. Fitzpatrick:

Q. Mr. Ritacco, were you employed by Mastro Plastics Corporation on the dates between October 23 and November 10, 1950?
A. I was, sir.
Q. Are you any longer employed by Mastro Plastics?
A. No, sir.
Q. What was your job during that period?
A. I was supposed to be a foreman, but I really was a working foreman, not a soft-collar foreman. My job was to see that the machines in the molding room ran.

. . . . . .

Q. Did you say anything to anyone on that day about having to join Mr. Tonelli's union?
A. No, sir.
Q. Or the Paper Workers' Union?
A. I didn't tell—only the morning that I started them machines, if that was on a Monday morning, when these new cards came around, and I was anxious to get my machines running because I get there at 5:30 and heat them up, and it takes two and two and a half hours.
Q. This is on October 23, about that date.
A. I believe that is the day, the day they claimed these cards came in the place.
[fol. 282] So my machines were ready and they were getting heated up and nobody seemed to pay any attention that I was preparing each machine. I have to prepare each machine for the operator. I take my first shots out, which

is all heated material at 500 degrees, and the longer you keep it the hotter it gets, and it is very dangerous to operate after it gets to a certain temperature. I have burns already on my hands from making it overheat. In other words, I was anxious to get these machines going. I seen them all around one machine, so I said, "Let me go see what the heck this is all about."

Q. That is to yourself you said that?

A. Yes.

So I went down there and somebody was handing cards out and I said, "What's going on?"

They said, "Well, we are going to get another union."

I said, "Come on, let's get these things over and let's get to the machines."

I was really getting mad, because I know what I have to do to get the machines running. And that is the way I got involved with that union. Otherwise I never said nothing to nobody about any union. I was non-union and I didn't care what anybody else was, as long as I knew what I was.

Q. You did take the cards and give them to——

A. I believe somebody had a pack of them in their hands, and I took the cards. I don't know who I gave them to. I didn't have no pencil. All I said, "Here, take a card, fill them out later or fill them at the machine."

. . . . . .

[fol. 283] Cross-examination:

Q. Do you remember a girl by the name of Virginia O'Neill being there that morning?

A. Yes, she was there.

Q. Did she have these cards?

A. I believe she was one of the ones that had cards in her hand.

Q. And she gave you some of the cards, or you took them?

A. I took cards from—I don't remember. There were so many there. I wanted to know what it was all about, so I took these cards, so I said, "What, another union?"

And they said, "Yes."

I said, "Well, let's give the cards out and let's get on to the machines."

Q. So you gave them out to whoever wanted them?

A. I gave them about three or four so they would start drifting toward their machines.

. . . . . .

Q. You saw the cards with the number "318"?

A. I didn't even read the cards because I was classed as a foreman, and we couldn't get in the union, so I wasn't interested in it.

Q. Didn't you sign a card for that union yourself?

A. I think I did, sir.

Q. Why was that?

A. I don't know. I thought maybe it would be a good thing for me to get in the union, too, some day.

Q. And do you know whether any other foremen or supervisors signed cards with the union?

A. I don't think I remember, sir.

[fol. 284] Q. Who asked you to sign a card?

A. I don't think anybody. I just grabbed a card and signed it myself. No particular person asked me.

Q. Was that the same morning when you gave the cards out?

A. Yes, I believe it was the same morning. I don't know. They must have those cards, haven't they?

Q. Did the other employes see you sign a card at that time?

A. I think they did, sir.

. . . . . .

ARTHUR ZEVIN a witness called by and on behalf of the Respondents, after being duly sworn, was examined and testified as follows:

Trial Examiner Leff: What is your full name?
The Witness: Arthur Zevin.
Trial Examiner Leff: And your address:
The Witness: 3640 Bowne Street, Flushing, Long Island.

Direct examination.

By Mr. Fitzpatrick:

Q. Mr. Zevin, between the dates October and November of 1950 you were the personnel director of Mastro Plastics Corporation?

A. That is right.

Q. Are you now employed by Mastro Plastics?

A. No, I am not.

Q. Do you recall November 10, which is the day on which the strike or walk-out occurred at Mastro Plastics?

A. Yes, I do. I remember.

Q. Tell us what you recall of the events of that day?

A. As I remember it, I received a phone call from Mr. [fol. 285-286] Maccaferri who was out of the building at the time, telling me that, contrary to instructions——

Mr. Rotolo: Can we fix the hour and time on this?

By Mr. Fitzpatrick:

Q. As closely as you can.

A. I think it was approximately two o'clock. I am not too sure of the time.

At that time Mr. Maccaferri told me that, contrary to instructions he had given to Frank Ciccone at some previous time, he had been out in the shop and, on some occasion, walking around the plant when he was supposed to be at work in the machine shop. He told me at that time to issue his final pay check and to discharge him from the payroll.

. . . . . .

STENOGRAPHIC TRANSCRIPT OF TESTIMONY

AT HEARING OF MARCH 20, 1952.

MARIO MACCAFERRI (Re-called) was called as a witness by and on behalf of the Respondents, and, having been previously sworn, testified further as follows:

. . . . . .

[fol. 287] Cross-examination

By Mr. Rotolo:

Q. Mr. Maccaferri, I am going to take you back now to the period prior to October 21, 1950. That is the Saturday [fol. 288] when those five employees came to your office. Now, in the period immediately preceding that, say, a week or two weeks before that, had you spoken to Mr. Tonelli about Local 318 coming into your plant?

A. Not exactly. The conversation with Mr. Tonelli was as explained to you a couple days ago, that we were concerned about the activity of Local 65, and his suggestion was that he should meet Mr. Saul to discuss and see what possibility there is to help this situation.

Q. Incidentally, did you go to this office?

A. Yes, I did.

Q. How did you know about Mr. Tonelli? Did you get an introduction to him?

Q. I explained that in my previous testimony. I can repeat it if you wish it.

Q. Tell us again.

A. During a meeting of the board of directors of my corporation at 120 Broadway, one of the directors, after having been informed of the existing situation or, better, of the activity of Local 65, and knowing the type of people we were there to do business with, he told me to get in touch with a person that he knew, and that he might have some suggestion. I went to see this person.

Q. Let me stop you there one moment.

At that time had Local 65 filed a petition with the National Labor Relations Board?

A. I don't know whether the petition was filed or not.

Q. Let me refresh your recollection.

A. If you know, just state it, of course.

Q. The petition of Local 65 was filed on September 28, 1950. Was it after September 28 that you went to Mr. Tonelli's office?

A. I couldn't tell you the exact date, but I could consult my minute book, the minute book of my corporation, and find the date that we had the meeting of the directors, and from that I think I could—it was about three or four days after this meeting.

Q. In any event you knew at that time that Local 65 was signing up your employees as members; is that right? [fol. 289] A. I knew that Local 65 was active in front of my shop and I brought it to the attention of Mr. Saul.

Q. All right.

A. That's all?

Q. It was after this you went to Mr. Tonelli's office, right?

A. I think so.

Q. Now, when you received the copy of the petition that was filed by Local 65, what did you do? Did you consult your attorney about it?

A. I don't know what date this petition was received.

Q. I told you it was filed September 28, and a copy was sent to you from this office.

A. I think so. I think I consulted my attorney, Mr. Kahn.

Q. Mr. Kahn was your general counsel?

A. Yes.

Q. And after you consulted with your attorney, was it then that you went to Mr. Tonelli?

A. I cannot put in the proper place these different meetings or conferences. I wish I could.

Q. You do recall when you went to Mr. Tonelli's office you talked about Local 65 getting into your plant, making headway in your plant, did you not?

A. Yes. That was the reason for my meeting——

Q. And you told Mr. Tonelli at that time that you didn't think that Local 2205 was strong enough to keep Local 65 out?

A. Yes. I told Mr. Tonelli what Mr. Saul told me and Mr. Saul told my lawyer, that he was not able to fight Local 65 out of there. That's his words, his own words.

Q. And you were worried about it?

A. I didn't like Local 65.

Q. You didn't want 65 to come into your plant under any circumstances, isn't that right?

A. Definitely.

Q. I think you testified before you would do anything to keep 65 out of your plant; right?

A. That's right. So far as closing my plant.

Q. So that the purpose of your visit to Mr. Tonelli was to find some way to keep 65 out of your plant, wasn't it?

[fol. 290-291] A. My visit with Mr. Tonelli was to get Mr. Tonelli with Mr. Saul and study what kind of action could be taken to enable me either to keep my present union that I had no complaint whatsoever against, or to explain to my employees what they were going—my employees didn't know much about Local 65 until Mr. Saul distributed pamphlets in the factory, and the result of this pamphlets was that all the employees, most of them, changed their minds and herded immediately against 65.

Mr. Rotolo: Mr. Examiner, I am going to insist during the course of my examination Mr. Maccaferri answer my questions and nothing more.

The Witness: I will try.

By Mr. Rotolo:

Q. I asked you before whether your trip to Mr. Tonelli's office was to find a solution to keep Local 65 out of your plant.

A. Yes.

Q. And one of the solutions you discussed with Mr. Tonelli was the possibility of having Local 22045 get out of the picture and turn their rights over to local 318. Isn't that right?

A. I didn't discuss that. They discussed, Tonelli and Mr. Saul.

Q. In your presence?

A. I was referred to Mr. Tonelli about this negotiation. There was some kind of arrangement that maybe would materialize whereby Local 22045 would turn over its interest to Local 318.

Trial Examiner Leff: Let me interrupt you a moment. Who told you this—Tonelli or Saul?

The Witness: Both of them.

Trial Examiner Leff: At the same time?

The Witness: No.

Trial Examiner Leff: Who told you first?

The Witness: That's difficult to know. We had a meeting the day after this conference with Mr. Tonelli in the office of Mr. Kahn. Mr. Kahn was present, too.

[fol. 292] Q. Did you see Virginia O'Neill on that Monday morning?

A. I don't recall it.

Q. You don't recall it?

A. No.

Q. Do you remember whether Virginia O'Neill came to you on that morning at any time and told you that she had signed 73 or 75 cards for Local 318?

A. I don't remember who told me that the big amount of cards were signed for 318. It was sometime around noon or eleven o'clock. I don't remember who told me.

Q. Somebody told you that a large number of cards had been signed?

A. That is right.

Q. Did you know Local 318 men were outside the plant waiting for the cards?

A. I heard.

Q. You heard?

A. I heard about it.

Q. You didn't talk to them yourself?

A. I never talked with them except with Mr. Tonelli. I don't know who they are.

Q. Did you talk with Mr. Tonelli that morning on the telephone?

A. I don't know, sir. I don't knew whether I talked with Tonelli that morning on the phone. I don't think so. I don't remember it.

Q. Did you talk to him in the afternoon?

A. Maybe.

Q. You might have?

A. How can I remember? I talked several times with Mr. Tonelli on the phone.

Q. In other words, you talked with Mr. Tonelli several times after that during that day?

A. After my first meeting with him, yes, several times, especially during the time of this negotiation between him and Saul.

Q. And while you were negotiating with Mr. Rothenberg and Mr. Saul on the new contract were you having these conversations with Mr. Tonelli?

A. We didn't negotiate any new contract with Mr. Saul and Mr. Rothenberg.

Q. Hadn't they submitted some demands to you in September, 12½ cents?

A. That's the demands submitted but there was no negotiation.

. . . . . .

[fol. 293] By Mr. Rotolo:

Q. In any event, you fired Ciccone because he left the machine shop on November 10, is that right?

A. Because he disregarded my definite instruction.

[fol. 294] Q. And you had ordered him to stay in the machine shop at all times?

A. Under any circumstances he was not——

Q. Not to leave?

A. Not to leave his own bench.

Q. Not even to get a Coca-Cola?

A. It wasn't a question of Coca-Cola. If a man needs a Coca-Cola, go and take it. If he needs to go to the bath room, go to the bath room.

. . . . . .

Q. When Mr. Rothenberg or Mr. Saul told you, "We can't keep 65 out, we are not strong enough", is that when you made up your mind you didn't want this union any more?

A. No, no, no. I made up my mind to find some way of helping them.

Q. You wanted to help them?

A. Yes.

Q. Help them by going to another union?

A. I didn't go to the CIO; I didn't go to any other union. I went to their own union.

Trial Examiner Leff: Which one?

The Witness: The A. F. of L. That was my impression, that they were all together.

I didn't go to any adverse union.

Mr. Rotolo: That is all.

The Witness: And if I wanted another union in their place I would have gone to the CIO, I would have gone to some other outfit.

By Mr. Rotolo:

Q. When you saw Ciccone on the morning of November 10 did you see him with any papers or any cards?

A. It is a very hard answer to give. I don't know whether it was cards or a work sheet, or a paper with a list of names. But when I went there he put it in his pocket, whatever it was. That's all.

[fol. 295] Q. And that was the suspicion that you had that he was doing something about the union with those cards. Isn't that the suspicion that you had?

A. I had suspicion, if you want to call it suspicion, it has been always——

Q. You always suspected?

A. I always suspected. They always talked about——

Q. No, Ciccone.

A. They didn't have any topic of great interest to talk together. The only thing it was to be talked together was union. I knew that for a long time.

Q. And you didn't want Ciccone to do that in your plant; isn't that right?

A. I wanted to stop it, and at two o'clock when I left the plant; I let them do it.

. . . . . .

FRANK CICCONE was re-called as a witness in rebuttal by and on behalf of the General Counsel, and, having been previously sworn, testified further as follows:

Trial Examiner Leff: Mr. Ciccone was previously sworn. All right.

Direct examination.

By Mr. Rotolo:

Q. Mr. Ciccone, it was testified here in your absence by Mrs. Maccaferri that on the day that you were discharged, November 10, you and Mr. Pieroni and Mr. Libutti about ten minutes before, or, rather, sometime before three o'clock, you and the other two men were marching through the plant in column formation tramping through the plant, that you were creating some kind of a disturbance. Is that right? [fol. 296] Mr. Fitzpatrick: I object to the form of the question.

Trial Examiner Leff: There was a reference they were marching through like storm troopers. I don't know what that means.

By Mr. Rotolo:

Q. Will you tell us what you did at that time with these other two men? Did you march through like storm troopers?

A. No, we walked normally, went directly to the Coke machine at a normal pace. We had our Coke and walked directly back to the machine shop conversing with each other on the way down.

Q. Now, when you talked with Mr. Maccaferri earlier in the day when he told you not to leave the machine shop earlier in the day, did he tell you you couldn't go out of the machine shop to get a Coca-Cola?

A. No, sir.

Q. What did you understand his orders to be?

A. Not to do any more maintenance work, to leave the machine shop to do any maintenance work of any kind in the plant.

Q. And did you leave your machine shop at any time dur-

ing that day to do any work in the packing room or in any other department?

A. After he told me I didn't leave, no, sir.

Q. With the exception of this one instance that you went to the Coca-Cola machine you didn't leave the machine shop?

A. No, sir.

Q. Did you have a regular rest period in the machine shop?

A. Well, I don't know if it was regular. We took it mostly whenever we felt like it. Most times I took it with the girls, but the other fellows took theirs whenever they felt like it.

[fols. 297-299] Q. Did you go to the Coca-Cola machine at any time previous to that time with the other boys at any time?

A. On that day, you mean?

Q. Not on that day; on previous occasions.

A. A few times, yes.

Q. Did anybody ever tell you you couldn't do that?

A. No, sir.

Q. Why did you take time off at that time on November 10, at that period, ten minutes to three?

A. Someone mentioned, "Let's go for a Coke", and we just went down and got a Coke.

Q. One of the other boys who went with you?

A. It was either Carl, Pete, or maybe one of the other fellows.

[fol. 300] LILLIE MADDALENA was called as a witness in rebuttal by and on behalf of the General Counsel, and, after being duly sworn, was examined, and testified as follows:

Trial Examiner Leff: What is your full name?
The Witness: Lillie Maddalena.
Trial Examiner Leff: And where do you live?
The Witness: 72 East 236th Street, Woodlawn, New York.

Direct examination.

By Mr. Rotolo:

Q. Were you working for Mastro Plastics Company in October and November, 1950?
A. Yes.

. . . . . .

[fols. 301-303] Q. What department were you working in?
A. Packing department.
Q. And do you recall the day that Frank Ciccone was discharged on November 10?
A. That is right, it was November 10.
Q. You were working in the packing department?
A. Yes.
Q. Who was your forelady or supervisor?
A. Mrs. Maccaferri was there.
Q. Do you remember in the afternoon of November 10 hearing Frank Ciccone had been discharged?
A. That is right.
Q. How did you know about it?
A. Because a couple girls got up and they walked out.
Mr. Fitzpatrick: I move to strike the answer.

By Mr. Rotolo:

Q. Tell us how you heard about it.

Trial Examiner Leff: Motion granted.
The Witness: Before that my machine broke down and another girl's machine broke down, so we sent for Frank, because he fixes our machine. So one of the fellows went in to call him. I can't recall his name. I know one was Bill. First Ted went in.

. . . . . .

[fol. 304] Trial Examiner Leff: Going back to November 10, now. That is the day when he was discharged?

Mr. Rotolo: In the afternoon.

By Mr. Fitzpatrick:

Q. Just keep your mind on that day, when Frank was discharged.

Who else was around when Virginia O'Neill said that her husband had built the plant?

Mr. Rotolo: That is not the testimony.

By Mr. Fitzpatrick:

Q. Mrs. Maccaferri.

A. There was a girl working next to me, Gloria Gonzales. There was another girl—I can't remember her name——

Trial Examiner Leff: To whom was Mrs. Maccaferri addressing her remarks, to all the people there, all the employees, or to you alone?

The Witness: Oh, no; she was talking, she meant that for everybody. Like you are sitting there and my machine is right here. I was facing her.

Trial Examiner Leff: How many other people were there at that time? This is about five o'clock?

The Witness: Yes.

[fol. 305] Trial Examiner Leff: Mr. Fitzpatrick wants to know who else was there then.

The Witness: I am not sure, but I think we were about four girls still working.

Mr. Rotolo: The others had walked out?

The Witness: Yes.

By Mr. Fitzpatrick:

Q. This was after Jane Pasculli and Sissy Martone and Mary Occhino walked out?

A. They started walking out.

Q. Were they still there when Mrs. Maccaferri was saying this?

A. Yes, they were just walking out.

Q. And outside of those three girls—Jane, Sissy and Mary—there were about four others there?

A. Yes. I think we were still working. I know it was me and Gloria. I can't remember the other two girls. I can't remember their names.

Q. Could one of them be Jean Bowerman?

A. Yes. I think she stayed.

Q. Could the other be Elizabeth Petrus?

A. Yes, she stayed.

Q. Was anybody else there?

A. I don't remember.

Q. Where was Mrs. Maccaferri at that time?

A. She was in back of me.

Q. At her desk?

A. No. She was standing up.

Q. Near her desk?

A. No. She was near the packing, where you pack clothes pins. It was almost near her desk.

Q. Was anybody working at the time?

A. Yes, I was working; Gloria, Elizabeth Petrus and Jean Bowerman. We were all working.

Q. You don't remember whether anybody else was working?

A. No, I don't remember.

Q. Where was Virginia at the time?

A. She was with Mrs. Maccaferri in back of me, too.

Q. Did Virginia O'Neill have any cards with her at that time?

A. I don't remember.

[fols. 306-307] Q. Did you turn around and see Mrs. Maccaferri?

A. Yes. I was looking at them, and they were laughing.

Q. Which one of them spoke first?

A. That I don't remember. I think it was Virginia O'Neill. She was laughing and saying, "Why don't you all get up?" She was looking at me and all the girls near me and telling us, "Why don't you get up and walk out?"

Q. What else did she say?

A. She said if we didn't join 318, Mr. Maccaferri told her we are all going to get fired.

Q. When?

A. If we didn't join 318.

Q. That afternoon?

A. She didn't tell us that afternoon; she told us the time she gave us the cards.

Mr. Fitzpatrick: No further questions.

Redirect examination.

By Mr. Rotolo:

Q. When you say there were about four girls left, was that after all the other girls had walked out?

A. That is right.

Q. You say first three girls walked out—Jane Pasculli and——

A. Sissy.

Q. Sissy Martone and Mary Occhino?

A. That is right.

Q. And then some more girls walked out after that?

A. Yes.

Q. And finally there were only about four or five of you left; is that right?

A. That is right. I think so.

Q. Was it when these other girls were about to walk out that they started talking the way you described?

A. That is right.

Q. Or afterwards?

A. While they were walking out she was saying that.

Q. The record shows that the group of girls walked out about 4.30.

A. That is right.

[fol. 308]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SECOND REGION

GENERAL COUNSEL'S EXHIBIT 1D

In the Matter

of

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO. INC.,

and

LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA

Case No. 2-CA-1799

COMPLAINT

It having been charged by Local 3127, United Brotherhood of Carpenters and Joiners of America, herein referred to as Local 3127, of 130 West 42nd Street, New York, New York, that Mastro Plastics Corp. and French-American Reeds Manufacturing Co. Inc., herein jointly referred to as Respondents, of 3040 Webster Avenue, Bronx, New York City, have engaged in and are now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, herein referred to as the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Second Region, designated by the Board's Rules and Regulations—Series [fol. 309] 6 Section 102.15, hereby issues this Complaint and alleges as follows:

1. Copies of the original Charge in this proceeding were served by registered mail upon the Respondents on January 31, 1951. Copies of the First Amended Charge were served by registered mail upon the Respondents on April 19, 1951. Copies of the Second Amended Charge were served by registered mail upon the Respondents on November 3, 1951.

2. Mastro Plastics Corp. and French-American Reeds

Manufacturing Co. Inc. are and have been at all times material herein corporations duly organized under and existing by virtue of the laws of the State of New York.

3. At all times herein mentioned, Respondents have maintained their joint principal office and a plant at 3040 Webster Avenue, in the City of New York, County of Bronx, and State of New York, where they are now and have been at all times material herein jointly engaged in the manufacture, sale and distributon of plastic articles, ukuleles, tiles, shoe forms, plastic reeds, accessories for musical instruments, and related products.

4. During the calendar year 1950, Respondent Mastro Plastics Corp., in the course and conduct of its business operations, caused to be purchased, transferred and delivered to its plant, materials and supplies valued at in excess of $500,000, of which approximately 90 percent was transported to said plant in interstate commerce from states of the United States other than the State of New York.

5. During the calendar year 1950, Respondent Mastro Plastics Corp., in the course and conduct of its business [fol. 310] operations, caused to be manufactured at its said plant, products valued at in excess of $1,000,000, of which approximately 90 percent was transported from said plant in interstate commerce to states of the United States other than the State of New York.

6. During the calendar year 1950, Respondent French-American Reeds Manufacturing Co. Inc., in the course and conduct of its business operations, caused to be purchased, transferred and delivered to its plant materials and supplies valued at in excess of $200,000, of which approximately 90 percent was transported to said plant in interstate commerce from states of the United States other than the State of New York.

7. During the calendar year 1950, Respondent French-American Reeds Manufacturing Co. Inc., in the course and conduct of its business operations, caused to be manufactured at its plant, products valued at in excess of $600,000, of which approximately 60 percent was transported from said plant in interstate commerce to states of the United States other than the State of New York.

8. Local 3127, United Brotherhood of Carpenters and

Joiners of America, herein referred to as Local 3127, and Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, herein referred to as Local 318, are each labor organizations within the meaning of Section 2(5) of the Act.

9. Respondents have, since on or about October 10, 1950, interfered with, restrained and coerced their employees in the exercise of their right to select a collective bargaining agent by:

[fol. 311] (a) Inducing and encouraging the representatives of the established collective bargaining agent of their employees to substitute Local 318 in the place and stead of said collective bargaining agent.

(b) Induieng and encouraging the representatives of Local 318 to engage in a campaign to displace the established collective bargaining agent of their employees.

(c) Sponsoring, supporting and assisting an organizational campaign on behalf of Local 318 to displace the established collective bargaining agent of their employees.

(d) Threats, warnings of reprisal, and promises of benefit to their employees to induce them to become and remain members of Local 318.

(e) Threats, warnings of reprisal, and promises of benefit to their employees to induce them to refrain from becoming or remaining members of Local 3127.

(f) Making membership in Local 318 and/or abandonment of membership in or activities on behalf of Local 3127 a condition of continued or new employment at their said plant.

(g) Soliciting, warning and threatening employees who engaged in picketing and other activities on behalf of Local 3127 to abandon such activities.

(h) Promising employees engaged in picketing and other activities on behalf of Local 3127, benefits and privileges to induce them to abandon such activities, and warning and threatening employees who did not abandon such activities with loss of employment or other rights and privileges.

[fol. 312] (i) Reinstating certain employees who did not engage in picketing or other activities on behalf of Local 3127 to their jobs without loss of seniority or other

rights and privileges while requiring employees who engaged in such activities to apply for new employment.

(j) Depriving employees who had engaged in picketing and other activities on behalf of Local 3127 of their seniority rights and other privileges by reinstating them, upon application, as new employees.

(k) Giving certain employees who were active in the organizational campaign for Local 318 financial or other rewards for such activities.

(l) Giving wage increases to employees who did not engage in picketing or other activities on behalf of Local 3127 and to those who abandoned their membership and activities on behalf of such organization.

10. Respondents have, since on or about October 10, 1950, sponsored, assisted and supported Local 318 to become and act as the collective bargaining agent of their employees.

11. Respondents did, on or about November 10, 1950, discharge Frank Ciccone employed at their said plant.

12. Respondents did, on or about November 10, 1950, discriminatorily lock out or constructively discharge the employees whose names appear on the appendix attached hereto and made a part hereof.

13. Respondents did, on or about December 11, 1950, terminate the employment of the employees whose names appear on the appendix attached hereto and made a part hereof.

[fol. 313] 14. On or about March 9, 1951, the employees named above in paragraphs 11, 12 and 13, applied for reinstatement to their former or substantially equivalent positions or employment.

15. Respondents have, since the dates of the discharges mentioned about in paragraphs 11, 12 and 13, failed to, refused and continue to fail and refuse to reinstate the employees named in said paragraphs to their former or substantially equivalent positions or employment.

16. Respondents did discharge and thereafter refused or failed to reinstate the employees named in paragraphs 11, 12 and 13 above, for the reason that they joined or assisted Local 3127 or engaged in other concerted activities on behalf of said organization for the purpose of collec-

tive bargaining or other mutual aid and protection or because they refused or failed to become or remain members of Local 318.

17. By the acts described above in paragraphs 9, 10, 11, 12, 13 and 15, and by each of said acts, Respondents did interfere with, restrain and coerce, and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby did engage in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

18. By the acts described above in paragraphs 9, 10, 11, 12, 13 and 15, Respondents did render and are rendering unlawful assistance and support to a labor organization and thereby did engage in and are engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

19. By the acts described above in paragraphs 9, 10, 11, 12, 13 and 15, Respondents did discriminate and are dis- [fol. 314] criminating in regard to the hire or tenure or terms and conditions of employment of the employees named above in paragraphs 11, 12 and 13, thereby encouraging membership in Local 318 and discouraging membership in Local 3127, and Respondents thereby did engage in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

20. The activities of Respondents, described above in paragraphs 9, 10, 11, 12, 13 and 15, occurring in connection with the operations of Respondents, described above in paragraphs 3, 4, 5, 6 and 7, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

21. The acts of Respondents, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (2) and (3) and Section 2(6) and (7) of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Second Region, on this 15th day of November, 1951, issues this Complaint against Mastro Plastics Corp. and French-American Reeds Manufacturing Co. Inc., respondents herein.

Charles T. Douds, Regional Director, National Labor Relations Board, 2 Park Avenue, New York 16, New York.

[fol. 315]

BEFORE THE

NATIONAL LABOR RELATIONS BOARD
SECOND REGION

GENERAL COUNSEL'S EXHIBIT 1E.

RESPONDENTS' ANSWER TO COMPLAINT

In the Matter

of

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO. INC.,

and

LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Case No. 2-CA-1799.

Now comes Mastro Plastics Corp. and French-American Reeds Manufacturing Co. Inc. and answer the complaint in the above entitled proceeding as follows:

1. They admit so much of paragraph 3 of the complaint as alleges that their several offices and several plants are located at 3040 Webster Avenue in the City of New York, County of Bronx, State of New York, and that respondent, Mastro Plastics Corp., has at all times material been engaged in the manufacture, sale and distribution of Plastic articles, ukuleles, tiles, shoe forms and related products and that French-American Reeds Manufacturing Co. Inc. has been engaged in said plant in the manufacture of reeds [fol. 316] and other accessories for musical instruments and related products, but otherwise deny each and all other allegations of said paragraph.

2. They deny any knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

3. They deny paragraphs 9, 10, 12, 14, 16, 17, 18, 19 and 21 of the complaint.

4. Respondent Mastro Plastics Corp. admits that it did, on or about November 10, 1950, discharge Frank Ciccone who had been employed by it at its said plant, but denies any implication that said discharge violated Section 8 of the National Labor Relations Act.

5. Each of the respondents with respect to those employed by it, severally admits that they terminated the employment of employees whose names appear on the appendix to the complaint, but deny that any of said terminations violated Section 8 of the National Labor Relations Act.

6. They admit, each for its respective employees, that they have not rehired the employees referred to in paragraph 15 of the complaint.

For an affirmative defense respondents allege as follows:

7. That on or about the 1st day of December, 1949 the agent of the bargaining unit of which the employees referred to in the complaint were members, was Local 22045, a federal labor union chartered by the American Federation of Labor and then having its office at 130 West 42nd Street, New York, New York.

[fol. 317] 8. That for a term of one year beginning on said 1st day of December, 1949 and terminating on the 30th day of November, 1950, the respondents made and entered into an agreement with said bargaining agent for the unit comprising said employees which provided in part as follows:

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruption or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement."

9. That on or about the 10th day of November, 1950, while the agreement aforesaid was in full force and effect, the employees named in the complaint herein did institute,

carry on and participate in a strike or work stoppage and did continue the same until notification by the respondents given on or about the 11th day of December, 1950 that their services were terminated.

For a second affirmative defense:

10. Respondents reallege the provisions of paragraphs 7 and 8 and further allege that the aforesaid agreement further provided in part as follows:

> "The Employers shall have the sole right to manage their plants and direct the working forces and all employees. The management shall include the right to direct all operations, purchases, and sales, to hire, transfer, promote, demote, lay off employees from duties because of lack of work in accordance with sen- [fol. 318] iority provisions, and the right to introduce new and improved methods, facilities, and equipment, and to determine working technique. The Employers shall also have the sole right to discipline and discharge employees for proper cause, provided, however, that any disciplinary action or discharge may be subject to review in accordance with the procedure set forth in Section 19, provided the matter is referred by the Union to the Employers within seven (7) days of the date of discharge by the notice required in Section 19. In case of discharge, the Employers shall notify the Union within twenty-four (24) hours. The Employers may adopt such rules and regulations from time to time as they may deem necessary and proper for the carrying on of their businesses, provided the same are not inconsistent with any of the express provisions of this agreement. The term "proper cause" as used in this section, shall include, but not be limited to, violation of any Employers rule or regulation.
>
> "The Union agrees to cooperate with the Employers to the end that employee efficiency, including quantity and quality of production, shall at all times continue to be maintained."

11. That on or about the 10th day of November, 1950 Frank Ciccone was directed by a duly authorized official

of the respondent, Mastro Plastics Corp., to remain during the attendance of said official at a meeting of the Board of Directors of said corporation at his own work station.

12. That during the absence of said official said Frank Ciccone, without permission, departed from his work station, wherefore his employment was terminated.

[fol. 319] WHEREFORE respondents respectfully pray that the complaint herein be dismissed.

Dated: New York, New York
January 15, 1952

Mastro Plastics Corp., French-American Reeds Manufacturing Co. Inc., 3040 Webster Avenue, Bronx, New York, By: /s/ Bernard H. Fitzpatrick, Attorney for Respondents, 60 Wall Street, New York 5, New York.

STATE OF NEW YORK,
County of New York—ss.:

Bernard H. Fitzpatrick, being duly sworn, deposes and says:

I am the attorney for the respondents in the within proceeding. I read the foregoing answer and know the contents thereof and I know the same to be true on information and belief and that I am empowered by the respondents herein, Mastro Plastics Corp. and French-American Reeds Manufacturing Co. Inc. to execute the same. The sources of my information and the grounds of my belief as to the matters averred in the foregoing answer are books and records of the respondents' office, interviews with officials [fols. 320-321] and employees thereof and with witnesses to the facts herein alleged.

Bernard H. Fitzpatrick.

Sworn to before me this 16th day of January, 1952, /s/ Thomas Sheehan, Notary Public, State of New York, No. 31-8955700, Qualified in New York County, Cert. filed with Bx., Kings, Queens, Richmond, Nassau and Westchester Count Clerks Bx., Kings, Queens, N. Y. Reg. Off. Comm. Exp. March 30, 1952
(Seal)

[fol. 322] Before the National Labor Relations Board, Second Region

GENERAL COUNSEL'S EXHIBIT 2.

Agreement, Local 3127 and Mastro, December 1, 1948.

AGREEMENT made this 1st day of December, 1948 by and between Local 3127, United Brotherhood of Carpenters and Joiners of America, 130 West 42nd Street, New York 18, New York, associated with the American Federation of Labor, an unincorporated association, hereinafter referred to as the "Union" and Mastro Plastics Corp. and French American Reeds Manufacturing Co. Inc. domestic corporations organized and existing under and by virtue of the laws of the State of New York with their principal offices for the transaction of business at No. 3040 Webster Avenue, County of Bronx, State of New York hereinafter referred to as the "Employers".

WITNESSETH:

WHEREAS, Mastro Plastics Corp. one of the Employers, is engaged in the manufacture of various articles made from plastics; and

WHEREAS, French American Reeds Manufacturing Co. Inc. one of the Employers is engaged in the business of the manufacture of reeds and accessories for musical instruments; and

WHEREAS, the parties hereto desire to enter into an agreement relating to the rates of pay, hours of work and other conditons of employment which will provide methods of harmonious cooperation between the Employers and their employees and to that end, accomplish fair and peaceful adjustments which may arise without interruption of the Employers' businesses; and

WHEREAS, the Union represents more than a majority of the employees covered by this agreement and has been duly authorized by the Labor Board of the State of New York as the bargaining agent of the employees of the [fol. 323] Employer and is duly authorized to enter into this agreement on behalf of said employees.

Now, THEREFORE, it is mutually agreed as follows:

1. The Employers recognize and acknowledge the Union as the sole collective bargaining agency for all of their employees, with respect to wages, hours and conditions of employment. The Employers shall employ and retain in their employ in any plant owned, operated, or controlled, directly or indirectly, by either of them, only employees in good standing with the Union except for those jobs which are now exempt. Exempt employees are office and clerical employees, executive and administrative employees, salesmen, watchmen, technicians, eight working foremen and foreladies for up to 150 employees and all supervisory employees. The Employers shall have the right to hire any employees who are not members of the Union, provided, however, that any such nonunion employees shall be required to join the Union within thirty days after commencing employment. Should any such nonunion employee fail to join the Union within said period of thirty days, the Employer shall discharge such employee at the expiration of said thirty-day period. Present employees who are not members of the Union must apply for membership within thirty days from the date hereof and the Employer shall discharge any employee who fails to do so. Persons failing to maintain good standing in the Union shall not be retained in the employment of the Employers. The Union agrees to accept into membership all employees covered by this agreement.

2. If a dispute arises as to whether an employee has failed to maintain his membership in the Union in good standing, or has been refused membership in the Union without cause, such dispute may be submitted for determination in accordance with the procedure provided in Section 19 of this contract.

[fol. 324] 3. The Employers agree that, upon receipt of a written assignment thereof, signed by the employee, they will deduct from such employee's wages, during the period specified in such assignment, the Union membership dues and remit the same to the Union, provided it appears upon the face of such assignment that it is not irrevocable for a period of more than one year or beyond the termination date of this agreement, whichever occurs sooner. Monies so

deducted by the Employers will be segregated and kept apart from its general fund until turned over to the Union.

4. If members of the Union take part in a strike or work stoppage, paragraphs 1 and 3 of this agreement shall be deemed null and void, and the Union shall be deprived of the union shop and check-off during the life of this agreement. Should the Employers declare a strike or work stoppage to be in effect, either party may avail itself of the arbitration procedure as set forth in Section 19 to obtain a determination of whether a strike, work stoppage, or lockout has occurred.

5. The Employers shall forthwith give the Union a written list of their employees other than exempt employees, together with their position, rate of pay, and addresses, and shall within one week of the hiring of a new employee notify the Union in writing of the name of such new employee, his or her position, rate of pay and address.

6. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interference or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.

7. The Employers agree that there shall be no lockout during the term of this agreement.

8. All new employees shall be on a probationary or trial period for thirty days after the date of their employ- [fol. 325] ment, during which they may be discharged by the Employers, with or without cause, and at the expiration of which period they shall become regular employees.

9. The Employers shall have the right to determine production and other requirements of their businesses and to lay off or furlough any employees when in the judgment of the Employers, it is necessary or desirable to do so. The Employers shall also have the right to transfer employees from one division or subdivision of their respective plants to another division or subdivision thereof and to transfer employees from the pay roll of either Employer to the pay roll of the other Employer. In the event that the Employer shall find it necessary or desirable to lay off or furlough any of their employees, those laid off or fur-

loughed, and the order in which they shall be recalled or rehired, shall be determined by seniority as provided in paragraph numbered "10" hereof.

10. The employers shall have the right during the term of this agreement to establish divisions or subdivisions of their respective plants in which event each such division or subdivision shall constitute a seniority area independently of seniority in any other areas in said plants. The seniority of the employees of each such division or subdivision shall be based upon (a) length of continuous employment, and (b) specialized skill for the performance of the particular job. When factor (a) is equal, then factor (b) shall govern. A new employee shall have no seniority rights during the trial or probationary period as defined in Section (8) hereof, but in the event that he becomes a regular employee after such period, seniority shall run from the first day of employment. Seniority shall be lost by an employee in the following cases:

(1) Resignation or quitting the job, (2) six consecutive months of unemployment, (3) failure to report for work within three (3) days of the time of notice of recall unless [fol. 32] the employee shall present an excuse satisfactory to the Employers, (4) absence for a period of three (3) working days from the time of an employee's last departure from the plant, unless the employee has within such three days presented in writing an excuse satisfactory to the Employers, (5) discharge by the Employers.

11. The normal work day for all employees other than those engaged in the injection moulding department shall consist of eight (8) hours, exclusive of thirty minute lunch period, and the normal work week shall consist of five (5) eight hour days. The regularly scheduled work day shall be from 8:30 a. m. to 5:00 p. m. with thirty minutes off for lunch. The Employers shall have the right to change the time of the commencing and ending of the regular work day upon one week's notice, posted on the bulletin board.

12. (a) The normal work week in the injection molding department shall be 40 hours per week, eight hours per day, 5 days per week, Monday to Friday inclusive.

(b) If and when it is necessary to operate extra shifts, the second shift will start about 3:30 p. m. and end about

12:00 midnight. The third shift will start about 11:30 p. m. and end about 8:00 a. m. the following morning.

13. There shall be two (2) rest periods for all employees of ten (10) minutes duration each during each full working day.

14. Overtime:

(a) All time worked in excess of forty (40) hours in a work week or eight (8) hours in any one day shall be paid for at a rate of time and a half the regular hourly rate.

(b) Overtime rates equal to time and one-half the regular hourly rate will be paid for time worked on the sixth consecutive day of the work week.

[fol. 327] (c) Overtime rates equal to twice the regular hourly rate will be paid for all time worked on the seventh consecutive day of the work week.

(d) In the computation of whether forty (40) hours have been worked in the first five (5) days of the work week, the employee will be credited with:

(1) holidays not worked, (2) vacation days for which payment is made, (3) time off granted with the permission of the Employers with pay, (4) machine breakdown not within the control of the employee.

15. The following days shall be recognized as holidays for which an employee will be paid his regular hourly rates for an eight (8) hour day and for which no work shall be required:

New Year's Day	Washington's Birthday
Decoration Day	Labor Day
Christmas Day	Thanksgiving Day
July 4th	

In the event that the holiday falls on a Sunday, it will be observed on the day set aside for the same. No employee shall receive pay for a holiday not worked unless he or she shall work at least thirty-two (32) hours in the week in which such holiday falls.

There shall be no discrimination against employees who in good faith and upon reasonable notice absent themselves from work without pay on holidays.

16. (a) Assembly department employees shall receive the following rates of pay:

1. Hiring rate, sixty-five (65¢) cents per hour.
2. Employed not less than thirty days; seventy-five (75¢) cents per hour.
3. Employed not less than eighteen months; eighty (80¢) cents per hour.

[fol. 328] (b) Injection moulding department employees shall receive the following rates of pay:

1. Hiring rate: ninety (90¢) cents per hour.
2. Employed not less than three months: ninety-five (95¢) cents per hour.
3. Employed not less than eighteen months: one dollar ($1.00) per hour.

Employees in this department shall in addition to the above rates receive five (5¢) cents additional per hour when working on the second shift, i. e. from the hours of about 3:30 p. m. to about 12:00 midnight, and ten (10¢) cents additional per hour when working on the third shift, that is to say, from the hours of about 11:30 p. m. to about 8:00 a. m.

(c) The hiring rate for all stock, shipping and floor employees shall be the sum of ninety (90¢) cents per hour. At the expiration of the thirty-day trial or probationary period, the rate of pay for all such employees shall be the sum of one dollar ($1.00) per hour.

(d) The foregoing rates shall be effective and shall be paid as of December 1, 1948.

The Employers may in their absolute discretion and during the term of this agreement install a wage incentive plan which may provide for a compensation in addition to the hourly rate of pay herein provided. Nothing in such an incentive wage plan, however, may reduce the amount an employee is to receive by reason of the hourly rates herein provided.

17. There shall be no lowering of wages or standards or working conditions of any employee as the result of this agreement.

18. Officers of the Union who are active employees of the Employer and stewards shall be governed by the regular plant rules. Officers of the Union who are active employees [fol. 329] of the Employer and stewards shall enter and remain in the plant only on their respective shifts except when otherwise agreed to by the Personnel Director. Officers, agents, representatives or members of the Union, who are not active employees of the Employer, shall be admitted to the plant for the purpose of negotiating with and handling grievances with the Personnel Director, Works Manager, or officers of the company, after arrangements have been made in advance for such a visit through the Personnel Director.

19. Disputes.

(a) Should differences arise between either of the Employers and the Union or its members as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretation, operation or application of any clause of this agreement or any breach or threatened breach of this agreement, such differences may be referred by either party, by giving one weeks written notice by registered mail to the other party, to a Conference Committee to settle such matter within one week thereafter, either party may refer the matter to arbitration, as hereinafter provided. Arbitration shall be before a board consisting of three persons, one to be designated by the Union, one to be designated by the Employers and a third, who shall act as Chairman, shall be selected by the Employers and the Union designees from the New York State Board of Mediation list of arbitrators. Should the designees fail to agree upon an arbitrator from said list, the Secretary of the New York State Board of Mediation shall designate the Chairman of the Arbitration Board. If either party shall fail to appear to proceed, after written notice by the Arbitration Board, such body may proceed, nevertheless, to determine the dispute and render a decision. The decisions of the Arbitration Board shall be binding upon the parties hereto and may be enforced by appropriate action in a Court of Law and Equity. The fees [fol. 330] and other costs of arbitration shall be borne equally by both parties.

(b) Nothing in this agreement shall in any way limit the rights of employees under Section 9 (a) of the Labor Management Relations Act of 1947.

20. In the event that either Employer does not desire to have some or all of its employees report for work on any regularly scheduled work day, a notice to that effect shall be published on the bulletin board on the previous regularly scheduled work day. Any employees reporting for work on a regularly scheduled work day for whom no work shall be provided, shall in the event the notice as above has not been given, be entitled to four hours pay at his regular rate. Irrespective to anything contained in the Section 20, no employee shall be entitled to such call-in pay unless he worked on the previous regularly scheduled work day.

21. All employees who have been employed by the Employers regularly and continuously for the length of time listed below prior to August 1st of any year during which this contract shall be in effect, shall receive a vacation with pay to the extent listed below opposite the respective periods of employment:

6 months—3 days
1 year —one week
2 years —one week one day
3 years —one week two days
4 years —one week three days
5 years —two weeks

Vacations will insofar as possible be granted during the summer months and at times most desired by employees, but the final right to allotment of vacation periods is reserved to the Employers in order to insure the efficient operation of the plant. Preferences for available vacation dates shall be granted according to seniority.
[fol. 331] A temporary shutdown for any reason of the entire plant or any subdivision thereof during the period of June 1st and September 1st may be declared a vacation period by the Employers for employees affected.

22. The Employers shall have the sole right to manage their plants and direct the working forces and all employees. The management shall include the right to direct all

operations, purchases, and sales, to hire, transfer, promote, demote, layoff employees from duties because of lack of work in accordance with seniority provisions, and the right to introduce new and improved methods, facilities, and equipment and to determine working techniques. The Employers shall also have the sole right to discipline and discharge employees for proper cause, provided, however, that any disciplinary action or discharge may be subject to review in accordance with the procedure set forth in Section 19, provided the matter is referred by the Union the Employers within seven (7) days of the date of discharge by the notice required in Section 19. In case of discharge, the Employers shall notify the Union within twenty-four hours. The Employers may adopt such rules and regulations from time to time as they may deem necessary and proper for the carrying on of their businesses, provided the same are not inconsistent with any of the express provisions of this agreement. The term "proper cause" as used in this section, shall include, but not be limited to, violation of any Employers rule or regulation.

The Union agrees to cooperate with the Employers to the end that employee efficiency, including quantity and quality of production, shall at all times continue to be maintained.

23. This agreement shall become effective as of December 1, 1948, and shall continue in effect until November 30, 1949, unless either party shall notify the other in writing at least 60 days prior to the end of the current term or as the case may be 60 days prior to the end of any additional [fol. 332] contract year of an intention to modify or terminate this agreement. If and when the 60 day notice is received by either party hereto, negotiations shall be promptly started. If within 30 days after the giving of aforesaid notice the parties are in dispute, the Federal Mediation and Conciliation Service and any existing New York State conciliation service shall be notified as provided by law.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers the day and year first above written.

French American Reeds Mfg. Co. Inc. /s/ Mario Mac-

caferri, Committee: /s/ Peter Pieroni, Henry A. Lezzi, Alma Zvoboda, Virginia O'Neill.

Local 3127, United Brotherhood of Carpenters and Joiners of America, /s/ A. H. Saul, Mastro Plastics Corp., /s/ Mario Maccaferri, Pres.

The following award made by Martin A. Wersing, Esq. member of the New York State Board of Mediation, and Arbitrator in the matter of Local 3127, United Brotherhood of Carpenters and Joiners of America, A. F. of L. and Mastro Plastics Corp. and French American Reeds Manufacturing Co. Inc. dated August 31, 1948, is hereby annexed to and made a part of the agreement dated December 1, 1948, between the aforementioned parties.

"1. The Company shall give a wage increase of five (5¢) cents per hour, effective as of August 17, 1948 and an additional two and one half (2½¢) cents per hour or a cost of living increase to the extent indicated by the percentage increase in Bureau of Labor Statistics Consumers' Price Indexes for New York City of the January 15th, 1949 index over that of July 15th, 1948, whichever is more beneficial to the employees, effective March 1st, 1949.

[fol. 333] 2. The Company shall increase the number of paid holidays to seven.

Committee: Peter Pieroni, Henry Iezzi, Alma Zwoboda, Virginia O'Neill.

(S) Martin A. Wersing, Arbitrator.

(S) A. H. Saul, Local 3127, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

/S/ Mario Maccaferri, Mastro Plastics Corp. /S/ Mario Maccaferri, Pres. French American Reeds Manufacturing Co. Inc.

[fol. 334] Before the National Labor Relations Board, Second Region.

GENERAL COUNSEL'S EXHIBIT 3.

Assignment of Agreement to Local 22045, March 7, 1949.

WHEREAS, a certain agreement dated the 1st day of December, 1948, was entered into by and between Local 3127, United Brotherhood of Carpenters and Joiners of America, No. 130 West 42nd Street, New York 18, N. Y. associated with the American Federation of Labor, an unincorporated association, and referred to as the Union, (hereinafter referred to as the Assignor); and Mastro Plastics Corporation and French American Reeds Manufacturing Co. Inc., a domestic corporation at No. 3040 Webster Avenue, County of Bronx, State of New York, referred to in said contract as Employers (hereinafter designated as Employers); and

WHEREAS, the Assignor is desirous of assigning said agreement to Local 22045, American Federation of Labor, with offices at 130 West 42nd Street, New York 18, N. Y. (hereinafter referred to as the Assignee); and

WHEREAS, the employees of the aforementioned Employers are desirous of transferring their affiliations to the said Assignee, and are further desirous that the said Assignee shall represent them with the said Employers.

NOW, THEREFORE, in consideration of One ($1.00) Dollar and other good and valuable consideration, each to the other in hands paid, the parties hereto agree as follows:

1. The Assignor hereby assigns all its rights, title and interest of, in and to a certain contract made by it with the Employers, dated December 1, 1948.

2. The Assignee agrees to assume and faithfully perform and discharge all the terms, conditions, covenants and obligations assumed, or to be performed, or discharged, by the Assignor under its said contract with the said Employers.

3. That the Assignor hereby agrees to secure the signature of each employee of its union now in the employ of the Employers, consenting to this assignment, and the

Assignee agrees to admit all of said employees to its union.
[fol. 335] 4. Employers hereby consent to this assignment.

In Witness Whereof, the parties hereto have hereunto set their respective hands and seals this 7th day of March, 1949.

Mastro Plastics Corporation By /s/ Mario Maccaferri

French American Reeds Mfg. Co. Inc. By /s/ Mario Maccaferri

Local 3127, United Brotherhood of Carpenters and Joiners of America Assignor By /s/ S. Rothenberg

Peter Pieroni
Alma Zvoboda
Virginia Oneill
Nicholas Levoa
John Barko
Carmine Libutti
Binardo Legger
Frank Ciccone
Evelyn Giarnella
Jean Bowerman
Florence Muendell
Alice Stern
Rachel Regge
Catherine Tretto
Dorothy Leganri
Irene P. Costa
Salvatore Mancuso
Frank D'Lorenzo
Anthony Maietti
Vernal Gibson
E. H. Onoork
Angelo Bruno
Anthony Purri
Michael Zinzi
Carmela Barronecchia
Josephine Puzzo
Lillian Kelly
Ralph Perrotta
John Crawford
Henry Paul
John H. McKinney
Eulogio Ramos
Rose Amoroso
Anthony Guzzutta
James Brown
Isiah C. Smith
Ciro Guerra
John Grosso
Morris Eskinazi
William Gregory
David S. Varde
Uvanias Gallo
Alexander Unger
Felix Avalo
Victor Sufferier
Joe Cirillo
Frank Squillante
Francisco Tommarillo
Mary Kennedy
Yolanda Martucci
Viola Hyde

[fol. 336] Before the National Labor Relations Board, Second Region.

GENERAL COUNSEL'S EXHIBIT 4.

Agreement, Local 22045 and Mastro, December 1, 1949.

AGREEMENT made this 1st day of December, 1949 by and between Local 22045, American Federation of Labor, 130 West 42nd Street, New York 18, N. Y., an unincorporated association, hereinafter referred to as the "Union" and Mastro Plastics Corp. and French American Reeds Manufacturing Co., Inc., domestic corporations organized and existing under and by virtue of the laws of the State of New York with their principal offices for the transaction of business at No. 3040 Webster Avenue, County of Bronx, State of New York, hereinafter referred to as the "Employers",

WITNESSETH:

WHEREAS, Mastro Plastics Corp., one of the Employers, is engaged in the manufacture of various articles made from plastic; and

WHEREAS, French American Reeds Manufacturing Co., Inc., one of the Employers, is engaged in the business of the manufacture of reeds and accessories for musical instruments; and

WHEREAS, the parties hereto desire to enter into an agreement relating to the rates of pay, hours of work and other conditions of employment which will provide methods of harmonious co-operation between the Employers and their employees and to that end accomplish fair and peaceful adjustments which may arise without interruption of the Employers' businesses; and

WHEREAS, the Union represents more than a majority of the employees covered by this agreement and has been duly certified by the Labor Board of the State of New York as the bargaining agent of the employees of the Employers and is duly authorized to enter into this agreement on behalf of said employees.

[fol. 337] Now, Therefore, it is mutually agreed as follows:

1. (a) The Employers recognize and acknowledge the Union as the sole collective bargaining agency for all of their employees, with respect to wages, hours, and conditions of employment. The Employers shall employ and retain in their employ, in any plant owned, operated, or controlled directly or indirectly by either of them, only employees in good standing with the Union except for those jobs which are now exempt. Exempt employees are office and clerical employees, executives, and administrative employees, salesmen, watchmen, technicians, eight working foremen and foreladies for up to 150 employees and all supervisory employees.

(b) The Employers shall have the right to hire any employees who are not members of the Union, provided, however, that any such nonunion employees shall be required to join the Union within thirty days after commencing employment. Should any such nonunion employee fail to join the Union within said period of thirty days, the Employer shall discharge such employee at the expiration of said thirty-day period. Present employees who are not members of the Union must apply for membership within thirty days from the date hereof and the Employer shall discharge any employee who fails to do so. Persons failing to maintain good standing in the Union shall not be retained in the employment of the Employers. The Union agrees to accept into membership all employees covered by this agreement.

2. If a dispute arises as to whether an employee has failed to maintain his membership in the Union in good standing, or has been refused membership in the Union without cause, such dispute may be submitted for determination in accordance with the procedure provided in Section 19 of this contract.

3. The Employers agree that, upon receipt of a written assignment thereof, signed by the employee, they will [fol. 338] deduct from such employee's wages, during the period specified in such assignment, the Union membership dues and remit the same to the Union, provided it appears

upon the face of such assignment that it is not irrevocable for a period of more than one (1) year or beyond the termination date of this agreement, whichever occurs sooner. Monies so deducted by the Employers will be segregated and kept apart from its general fund until turned over to the Union.

4. The Employers shall forthwith give the Union a written list of their employees other than exempt employees, together with their position, rate of pay, and addresses, and shall within one (1) week of the hiring of a new employee notify the Union in writing of the name of such new employee, his or her position, rate of pay and address.

5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.

6. The Employers agree that there shall be no lockout during the term of this agreement.

7. Either party may avail itself of the arbitration procedure as set forth in Section 19 to obtain a determination of whether a strike, work stoppage, or lockout has occurred.

8. All new employees shall be on a probationary or trial period for thirty days after the date of their employment, during which they may be discharged by the Employers, with or without cause, and at the expiration of which period they shall become regular employees.

9. The Employers shall have the right to determine production and other requirements of their businesses and to lay off or furlough any employees when, in the judgment of the Employers, it is necessary or desirable to do so. [fol. 339] The Employers shall also have the right to transfer employees from one division or subdivision of their respective plants to another division or subdivision thereof and to transfer employees from the pay roll of either Employer to the pay roll of the other Employer. In the event that the Employers shall find it necessary or desirable to lay off or furlough any of their employees, those laid off or furloughed, and the order in which they shall be recalled or

rehired, shall be determined by seniority as provided in paragraph numbered "10" hereof.

10. The Employers shall have the right during the term of this agreement to establish divisions or subdivisions of their respective plants in which event each such division or subdivision shall constitute a seniority area independent of seniority in any other areas in said plants. The seniority of the employees of each such division or subdivision shall be based upon (a) length of continuous employment and (b) specialized skill for the performance of the particular job. When factor (a) is equal, then factor (b) shall govern. A new employee shall have no seniority rights during the trial or probationary period as defined in Section (8) hereof, but in the event that he becomes a regular employee after such period, seniority shall run from the first day of employment. Seniority shall be lost by an employee in the following cases:

(1) Resignation or quitting the job, (2) six (6) consecutive months of unemployment, (3) failure to report for work within three (3) days of the time of notice of recall unless the employee shall present an excuse satisfactory to the Employers, (4) absence for a period of three (3) working days from the time of an employee's last departure from the plant, unless the employee has within such three days presented in writing an excuse satisfactory to the Employers, (5) discharge by the Employers.

11. The normal work day for all employees other than those engaged in the injection moulding department shall [fol. 340] consist of eight (8) hours, exclusive of thirty (30) minute lunch period, and the normal work week shall consist of five (5) eight hour days. The regularly scheduled work day shall be from 8:30 A. M. to 5:00 P. M., with thirty (30) minutes off for lunch. The Employers shall have the right to change the time of the commencement and ending of the regular work day upon one week's notice, posted on the bulletin board.

12. (a) The normal work week in the injection moulding department shall be 40 hours per week, eight hours per day, 5 days per week, Monday to Friday inclusive.

(b) If and when it is necessary to operate extra shifts, the second shift will start about 3:30 P. M. and end about 12:00 midnight. The third shift will start about 11:30 P. M. and end about 8.00 A. M. the following morning.

13. There shall be two (2) rest periods for all employees of ten (10) minutes duration each during each full working day.

14. OVERTIME:

(a) All time worked in excess of forty (40) hours in a work week or eight hours in any one day shall be paid for at a rate of time and a half the regular hourly rates.

(b) Overtime rates equal to time and one-half the regular hourly rate will be paid for time worked on the sixth consecutive day of the work week.

(c) Overtime rates equal to twice the regular hourly rate will be paid for all time worked on the seventh consecutive day of the work week.

(d) In the computation of whether forty (40) hours have been worked in the first five (5) days of the work week, the employee will be credited with:

(1) holidays not worked, (2) vacation days for which payment is made, (3) time off granted with the permission [fol. 341] of the Employers with pay. (4) machine breakdown not within the control of the employee.

15. The following days shall be recognized as holidays for which an employee will be paid his regular hourly rates for an eight (8) hour day and for which no work shall be required:

New Years Day
Decoration Day (5/30)
July 4th
Washington's Birthday (2/22)
Labor Day (first Monday September)
Thanksgiving Day (last Thursday Nov.)
Christmas

In the event the holiday falls on a Sunday, it will be observed on the day set aside for the same. No employee shall receive pay for a holiday not worked unless he or

she shall work at least thirty-two (32) hours in the week in which such holiday falls.

There shall be no discrimination against employees who in good faith and upon reasonable notice absent themselves from work without pay on holidays.

16. (a) Assembly department employees shall receive the following minimum rates of pay:

1. Hiring rate—75¢ per hour
2. After 30 days of employment—80¢ per hour
3. After 18 months of employment—85¢ per hour

(b) Injection moulding department employees shall receive the following minimum rates of pay:

1. Hiring rate—90¢ per hour
2. After 30 days of employment—95¢ per hour
3. After 18 months of employment—$1.00 per hour

(c) Shipping and stockroom employees shall receive the following minimum rates of pay:

[fol. 342] 1. Hiring rate—90¢ per hour
2. After 30 days of employment—$1.00 per hour

(d) Tool Room Department employees shall receive the following minimum rates of pay:

Machinist — Grade	A	$1.50	per hour
	B	1.25	" "
Tool & Die	A	1.60	" "
	B	1.30	" "
Helper & Apprentice		1.00	" "

(e) Shoe Form Department employees shall receive the following minimum rates of pay:

1. Hiring rate—90¢ per hour
2. After 3 months of employment—95¢ per hour
3. After 18 months of employment—$1.00 per hour

(f) Each employee shall in addition to his regular hourly rate receive five (5¢) cents additional per hour when working on the second shift, i. e., from the hours of about 3:30

P. M. to about 12:00 midnight, and ten (10¢) cents additional per hour when working on the third shift, that is to say, from the hours of 11:30 P. M. to about 8:00 A. M.

(g) The foregoing minimum rates shall be effective and shall be paid as of December 1, 1940.

The Employers may in their absolute discretion and during the term of this agreement install a wage incentive plan which may provide for a compensation in addition to the hourly rate of pay herein provided. Nothing in such an incentive wage plan, however, may reduce the amount an employee is to receive by reason of the hourly rates herein provided.

[fol. 343] 17. There shall be no lowering of wages or standards or working conditions of any employee as the result of this agreement.

18. Officers of the Union who are active employees of the Employer and Stewards shall be governed by the regular plant rules. Officers of the Union who are active employees of the Employer and Stewards shall enter and remain in the plant only on their respective shifts, except when otherwise agreed to by the Personnel Director, Officers, agents, representatives or members of the Union, who are not active employees of the Employer, shall be admitted to the plant for the purpose of negotiating with and handling grievances with the Personnel Director, Works Manager, or officers of the Company, after arrangements have been made in advance for such a visit through the Personnel Director.

19. DISPUTES:

(a) Should differences arise between either of the Employers and the Union or its members as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement, such differences may be referred by either party, by giving one (1) week's written notice by registered mail to the other party, to a Conference Committee to settle such matter within one (1) week thereafter, either party may refer the matter to arbitration, as hereinafter provided. Arbitration shall be

before a board consisting of three (3) persons, one (1) to be designated by the Union, one (1) to be designated by the Employers and a third, who shall act as Chairman, shall be selected by the Employers and the Union designees from the New York State Board of Mediation list of [fol. 344] arbitrators. Should the designees fail to agree upon an arbitrator from said list, the Secretary of the New York State Board of Mediation shall designate the Chairman of the Arbitration Board. If either party shall fail to appear or to proceed, after written notice by the Arbitration Board, such body may proceed, nevertheless, to determine the dispute and render a decision. The decisions of the Arbitration Board shall be binding upon the parties hereto and may be enforced by appropriate action in a Court of Law and Equity. The fees and other costs of arbitration shall be borne equally by both parties.

(b) Nothing in this agreement shall in any way limit the rights of employees under Section 9 (a) of the Labor-Management Relations Act of 1947.

20. In the event that either Employer does not desire to have some or all of its employees report for work on any regularly scheduled work day, a notice to that effect shall be published on the bulletin board on the previous regularly scheduled work day. Any employees reporting for work on a regularly scheduled work day for whom no work shall be provided, shall in the event the notice as above has not been given, be entitled to four (4) hours pay at his regular rate. Irrespective of anything contained in the Section 20, no employee shall be entitled to such call-in pay unless he worked on the previous regularly scheduled work day.

21. All employees who have been employed by the Employers regularly and continuously for the length of time listed below prior to August 1st of any year during which this contract shall be in effect, shall receive a vacation with pay to the extent listed below opposite the respective periods of employment:

6 months	— 3 days
1 year	— one week
[fol. 345] 2 years	— one week

3 years — one week and two days
4 years — one week and three days
5 years — two weeks

Vacations will insofar as possible be granted during the summer months and at times most desired by employees, but the final right to allotment of vacation periods is reserved to the Employers in order to insure the efficient operation of the plant. Preferences for available vacation dates shall be granted according to seniority.

A temporary shutdown for any reason of the entire plant or any subdivision thereof during the period of June 1st and September 1st may be declared a vacation period by the Employers for employees affected.

22. The Employers shall have the sole right to manage their plants and direct the working forces and all employees. The management shall include the right to direct all operations, purchases, and sales, to hire, transfer, promote, demote, lay-off employees from duties because of lack of work in accordance with seniority provisions, and the right to introduce new and improved methods, facilities, and equipment and to determine working technique. The Employers shall also have the sole right to discipline and discharge employees for proper cause, provided, however, that any disciplinary action or discharge may be subject to review in accordance with the procedure set forth in Section 19, provided the matter is referred by the Union to the Employers within seven (7) days of the date of discharge by the notice required in Section 19. In case of discharge, the Employers shall notify the Union within twenty-four (24) hours. The Employers may adopt such rules and regulations from time to time as they may deem necessary and proper for the carrying on of their businesses, provided the same are not inconsistent with any of [fol. 346] the express provisions of this agreement. The term "proper cause" as used in this sectoin, shall include, but not be limited to, violation of any Employers rule or regulation.

The Union agrees to co-operate with the Employers to

the end that employee efficiency, including quantity and quality of production, shall at all times continue to be maintained.

23. (a) The wage rate of each employee covered by this agreement and in the employ of the Employers on December 1, 1949, shall be increased by the sum of three (3¢) cents per hour, retroactive to said date of December 1, 1949. Each such employee shall receive a further increase in wage rate in the sum of two (2¢) cents per hour, beginning April 1, 1950.

(b) The Union agrees that the foregoing wage increases will be paid by the Employers and accepted by the Union in lieu of the wage increases granted by Richard M. Monfried, Esq., Arbitrator, under paragraph 1 and 10 of his award, dated February 1, 1950 and said part of his Award is hereby changed accordingly.

24. This agreement shall become effective as of December 1, 1949 and shall continue in effect until November 30, 1950, unless either shall notify the other in writing at least 60 days prior to the end of the current term or as the case may be 60 days prior to the end of any additional contract year of an intention to modify or terminate this agreement. If and when the 60 day notice is received by either party hereto negotiations shall be promptly started. If within 30 days after the giving of aforesaid notice the parties are in dispute, the Federal Mediation and Conciliation Service and any existing New York State Conciliation service shall be notified as provided by Law.

[fols. 347-349] In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective officers the day and year first above written.

Local 22045, American Federation of Labor by (S) A. H. Saul, Rep., Official Representative, Mastro Plastics Corp., by (S) Mario Maccaferri, Pres., French American Reeds Manufacturing Co., Inc., by (S) Mario Maccaferri, Pres.

Approved:

Employees' Negotiating Committee.

By Virginia O'Neill, Alma Zwobada, Peter Pieroni.

[fol. 350] Before the National Labor Relations Board
Second Region

GENERAL COUNSEL'S EXHIBIT 5.

Room 910 BRyant 9-7427-8
130 West 42nd Street
New York 18, N. Y.

LOCAL UNION 22045

Affiliated with
American Federation of Labor
(UNION LABEL)

September 29, 1950

Mastro Plastics Corp.
3040 Webster Avenue
Bronx, New York

Gentlemen:

Please be advised that we are requesting modification of our contract with you.

[fol. 351] We should like to meet with you prior to October 15, 1950, for the purpose of negotiating such modification.

Please call this office at any time prior to such date for the purpose of setting a time and place for our meeting with you.

Very truly yours,

S. Rothenberg

SR/nb

Before the National Labor Relations Board Second Region

GENERAL COUNSEL'S EXHIBIT 7.

Cable address "FAREED"

Telephone OLinville 5-6700
Effective Nov. 9, 1950

New Telephone KIngsbridge 7-5600

MASTRO PLASTICS CORP.
Mario Maccaferri, President

Molder—mold maker—designer—and manufacturer of plastic products

3040 Webster Avenue—New York 67, N. Y.

December 11, 1950

REGISTERED LETTER

Vernal Gibson
2275 Bassford Ave.
New York, New York

Dear Sir:

We do hereby advise you that due to your having breached your contract with us, which did not expire until November 30, 1950, by going out on strike on November 10, [fols. 352-353] 1950, in violation of the provisions of the contract, we have terminated your employment with this corporation.

Yours truly,

Mastro Plastics Corp., Mario Maccaferri, President.

MMAO R. C.

Before the National Labor Relations Board, Second Region

GENERAL COUNSEL'S EXHIBIT 8.

Mastro Plastics Corp. March 9, 1951
3040 Webster Avenue
Bronx, New York

Gentlemen:

You are hereby advised that each of your employees desire to return to work and hereby make unconditional application to do so. Please let us know when employees may return for work.

You are further advised that the undersigned is authorized to make this application; it is to be considered by you as a continuing one for each of your employees.

Very truly yours,

AR/nb
Reg. R. R.

A. Roberts
Representative

[fol. 354] Before the National Labor Relations Board,

Second Region

RESPONDENTS' EXHIBIT 3.

1. That all employees, including work foremen, be members of the Union.
2. Just cause for discharge by arbitration.
3. Lay-off by seniority in their respective departments.
4. Overtime after 8 hours instead of 40 hours.
5. Two additional paid holidays, and the holidays shall be paid regardless of the day of the week on which it falls. Also, to modify it so that they will receive pay for the holidays if they have worked within 30 days of the holiday.
6. 25¢ blanket increase, and increase that is given to be added to the minimum rates of pay.
7. In our present contract, the rates of pay where there is an increase mentions 18 months. This is to be changed to 12 months.
8. Vacation clause to be modified as follows:

6 months ..... 3 days

1 year	1 week
2 years	2 weeks

and lay-off time to be credited up to 6 months, with regard to seniority.

9. A 5% Union Welfare Fund to cover all members for disability, sickness, and distress.

10. On any standards of work, a Union Committee shall negotiate with the employer the standard to be set.

[fols. 355-357] Before the National Labor Relations Board, Second Region

RESPONDENTS' EXHIBIT 13.

It has been rumored that on Monday morning, November 13th, there is going to be a strike of the employees.

Any employee who will go on strike on Monday will forfeit his or her right to their jobs, because they will be in violation of the present union contract.

We will have no alternative but to replace each and every worker who goes on strike on Monday.

Mastro Plastics Corp. and French American Reeds Mfg. Co., Inc., Mario Maccaferri, President

[fol. 358] Before the
National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

INTERMEDIATE REPORT

IR-788
New York, N. Y.

[TITLE OMITTED]

STATEMENT OF THE CASE

A charge having been duly filed by Local 3127, United Brotherhood of Carpenters and Joiners of America, herein [fol. 359] called Local 3127, on January 26, 1951, and amended on April 18, 1951, a complaint and notice of hearing thereon having been issued and served by the

General Counsel on September 6, 1951, and an answer having been filed by the Respondents, Mastro Plastics Corp. and French-American Reeds Manufacturing Co. Inc., a hearing was held at New York City between March 3 and March 21, 1952, before Arthur Leff, the undersigned duly designated Trial Examiner.

The complaint alleged in substance that the Respondents engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (2), and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, by:

1. Illegally infringing upon guaranteed employee rights, since on or about October 10, 1950, in the following respects: a) Encouraging representatives of the established collective bargaining agent of their employees to substitute in its place and stead another labor organization, to wit: Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, herein called Local 318; (b) encouraging Local 318 to engage in a campaign to displace the established collective bargaining agent; (c) sponsoring, supporting, and assisting the organizational campaign of Local 318; (d) giving financial and other rewards to employees active in the organizational campaign of Local 318; (e) inducing employees, by threats of reprisal and promises of benefit, to become members of Local 318 and to refrain from membership in Local 3127; (f) making membership in Local 318 and/or abandonment of membership in Local 3127 a condition of continued or new employment; (g) inducing employees, by solicitation, threats and promises of [fol. 360] benefit to abandon picketing, and other activities on behalf of Local 3127; (h) reinstating employees who refrained from picketing and other activities on behalf of Local 3127 to their jobs without loss of seniority or other rights and privileges while requiring employees who engaged in such activities to apply for new employment; and (i) granting wage increases to employees who refrained from picketing and other activities on behalf of Local 3127, and to those who abandoned their membership and activities on behalf of Local 3127.

2. Sponsoring, assisting, and supporting Local 318 to become collective bargaining agent of their employees.

3. Discriminatorily discharging Frank Ciccone on or about November 10, 1951, because of his membership in and concerted activities on behalf of Local 3127 and because of his refusal to become or remain a member of Local 318.

4. Discriminatorily locking out or constructively discharging 76 additional named employees on or about November 10, 1951, for the same reasons.

5. Rejecting on or about March 11, 1951, and thereafter, applications for reinstatement to their former or substantially equivalent positions, made by the 77 employees above referred to.

The Respondents' answer as amended admitted the discharge of Frank Ciccone and the termination of employment of the others named in the complaint, but denied generally all allegations of the complaint attributing to the Respondents the commission of unfair labor practices. With regard to Ciccone's discharge, the answer alleged [fol. 361] affirmatively that Ciccone was discharged for violating a specific direction of an official of the Respondents to remain at his work station during the attendance of said official at a Board of Directors meeting. With regard to the others named in the complaint, the answer in substance alleged affirmatively (1) that they were validly terminated for engaging in a strike in violation of a no-strike provision of an existing collective bargaining agreement, and (2) that they lost their status as employees under Section 8 (d) of the Act because they engaged in a strike less than 60 days after their collective bargaining representative served notice upon the Respondents of a proposed termination or modification of an existing collective bargaining contract.

All parties were represented at the hearing by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence on the issues. At the opening of the hearing the Respondents objected to the Trial Examiner proceeding to hear the issues of the complaint relating to the alleged discrimnatory discharges, upon the ground that there was then pending undetermined before the Board a representation proceeding (Case No. 2-RC-3170) involving, *inter alia*, the

issue of whether those alleged to have been discriminated against occupied the status of employees of the Respondents. In the alternative, the Respondents moved to strike the allegations of the complaint relating to discrimination and/or to stay the hearing in the instant complaint case pending the completion of the aforesaid representation proceeding. The objection of the Respondents was overruled, and their motions were denied. The Board denied the Respondents' application to appeal from these rulings [fol. 362] on the ground that the issues raised could best be determined by the Board on the basis of the record as a whole. At the close of the General Counsel's case a motion made by the Respondents, to dismiss the allegations of the complaint relating to the alleged discriminatory lock-out, was denied with leave to renew at the close of the entire case. At the close of the case, decision was reserved on various motions made by the Respondents to dismiss the complaint in its entirety, as well as certain specific allegations thereof, for insufficiency of proof and upon other grounds. These motions are now disposed of in accordance with the findings of fact and conclusions of law made below. A motion of the General Counsel was granted to conform the pleadings to the proof with regard to minor variances. Opportunity was afforded all parties to argue orally upon the record at the close of the case, and to file briefs and proposed findings and conclusions. The General Counsel and the Respondent argued orally at the hearing, and the General Counsel filed a brief thereafter.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondents

Mastro Plastics Corp. and French-American Reeds Manufacturing Co. Inc., are New York corporations, having their principal office and place of business at Bronx, New York, and together employing a unitary work force. The Respondents are engaged in the manufacture, sale, and distribution of plastic articles, ukeleles, tiles, shoe forms, plastic reeds, accessories for musical instruments,

[fol. 363] and related products. During 1950, the Respondent, Mastro Plastics Corp., purchased materials and supplies valued in excess of $500,000, and the Respondent, French-American Reeds Manufacturing Co. Inc., purchased materials and supplies valued in excess of $200,000. Approximately 90 per cent of the materials and supplies purchased by each Respondent was transported to its Bronx, New York, plant in interstate commerce from States of the United States other than the State of New York. During the same year, the Respondent, Mastro Plastics Corp., manufactured at its plant products valued in excess of $1,000,000, and the Respondent, French-American Reeds Manufacturing Co. Inc., manufactured products valued in excess of $600,000. Approximately 90 per cent of the products of Mastro Plastics Corp. and 60 per cent of the products of French-American Reeds Manufacturing Co. Inc., were transported from their said plant in interstate commerce to States of the United States other than the State of New York. The Respondents admit they are engaged in commerce within the meaning of the Act.

II. The Labor Organizations Involved

Local 22045, American Federation of Labor, Local 3127, United Brotherhood of Carpenters and Joiners of America, and Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, is each a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. *Introduction*

Although separate and distinct corporate entities, the 2 Respondents occupy the same plant and utilize the same [fol. 364] work force, which, during the period material herein numbered some 150 employees. It is conceded that those alleged to have been discriminated against were employees of both Respondents. Mario Maccaferri is the president of both corporations, and his wife, Maria—who also works at the plant in a supervisory capacity—the vice president. Other management or supervisory personnel who figure in the events to be narrated below are Arthur

Zevin, described by Maccaferri as the Respondents' labor relations director and by Zevin as their personnel director; Max Studli, foreman of the machine shop: Alma Zwoboda, forelady in the finishing department; and William Ritacco, a day shift foreman in the molding department. At the hearing, the Respondent conceded the supervisory status of all those named, with the possible exception of Ritacco. As to him, the Respondents' position appears to be equivocal, but the evidence in any event shows clearly enough that he possessed sufficient attributes of authority to bring him within the supervisor's definition of Section 2 (11) of the Act.[1]

[fol. 365] Local 3127 is one of three local labor organizations that are affiliated in the sense that they have common business representatives and share a common business office. The others are Federal Labor Union, Local 22045, which is involved in this controversy, and Federal Labor Union, Local 18465 (also known as Picture Frame Workers Union), which is not. At present Abraham H. Saul, a member of the New York Bar, serves all three unions as business representative and attorney. At the time of the events narrated below the common business representative of all

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[1] Ritacco had charge of some 12 machine jobs. It was his function to set up the jobs and keep the machines in repair. When all machines were in operation he performed no manual work himself, but would go from machine to machine overseeing the work of the operators. He was authorized to give orders to the operators, to give them permission to leave work in the event of illness or the like, and to recommend the discharge of employees whose work he directed. On a number of occasions he had recommended the discharge of employees, and his recommendations had been followed. He was classified as a working foreman, a classification exempt from the coverage of the collective bargaining agreement hereinafter referred to.

In July or August of 1948, Local 3127, United Brotherhood of Carpenters and Joiners of America, was certified by the New York State Labor Relations Board as the exclusive bargaining representative of the Respondents' production and maintenance employees.

three locals was Sol Rothenberg, since deceased. Saul then acted as attorney for the three locals and also in a business capacity at least for Local 3127 and Local 22045.

After its certification, Local 3127 entered into negotiations with the Respondents, and in the course of time concluded a written collective bargaining agreement to run for a term expiring November 30, 1949. During the negotiations Local 3127 insisted upon the inclusion in the contract of a welfare fund provision calling for employer contributions. The Respondents at first agreed to this, but later refused to execute any agreement with such a provision, and as a result the contract eventually signed omitted the welfare clause. Shortly after the execution of the contract, Saul advised the Respondents that because of this omission Local 3127 could not fulfill its obligations under the contract. The reason for this, Saul explained at the hearing, was that Local 3127 had an established welfare fund from which all members were entitled under its constitution to draw benefits, and it would have been an unwarranted drain on that fund to permit benefit participation by employees of an employer who did not contribute to it. It was suggested by Saul, and agreed to by Maccaferri for the Respondents, that this difficulty might be over- [fol. 366] come by allowing Local 3127 to assign to Local 22045 all its right, title, and interest in the recently executed collective bargaining agreement with the Respondents.

Consequently, on March 7, 1949, Local 3127, with the written consent of the Respondents, assigned to Local 22045 its interest in the collective bargaining agreement expiring on November 30, 1949, and Local 22045 assumed the obligations of Local 3127 thereunder. At about the same time a consent to the assignment was signed by a majority of the employees in the bargaining unit.

When the term of the first contract expired, a new contract was entered into—this time with Local 22045 as the signatory—for a term of 1 year, expiring November 30, 1950. The new contract, like the old one, contained a union-shop provision, requiring then present employees who were not members of Local 22045 to apply for membership in that Local within 30 days from the execution date of the

contract, and new employees to apply within 30 days after commencing their employment.[2] The contract also contained the following no-strike and no-lockout clauses which are particularly pertinent to this proceeding:

> 5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of work by any of its members. The Union further agrees to refrain from [fol. 367] engaging in any strike or work stoppage during the term of this agreement.
> 6. The Employers agree that there shall be no lockout during the term of this agreement.

With regard to disputes, the contract made provision for the arbitration of differences arising between the parties "as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretation, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." The contract vested in the Respondents the sole right to discipline and discharge employees for proper cause, but provided that any disciplinary or discharge action was to be subject to review under the arbitration procedures. To obtain such review the Union was required within 7 days from the date of discharge to serve written notice upon the Respondents by registered mail.

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[2] So far as appears, no union shop authorization election was ever held, although majority authorization at such an election was then required as a condition precedent to a valid union-shop agreement. The General Counsel expressly stated that he was not in this proceeding attacking the legality of the collective bargaining contract because of any invalidity of the union-shop provision, or for any other reason.

B. *Local 65 institutes an organizational campaign among the Respondents' employees*

In August 1950, Local 65 of the Wholesale and Warehouse Workers Union began an organizational campaign among the Respondents' employees. Apparently this campaign met with some measure of success, for, on September 28, 1950, Local 65 filed a petition with the Board seeking certification as bargaining representative. Maccaferri, the Respondents' president, was admittedly aware of Local 65's campaign, and feared it. He was bitterly opposed to Local 65 which he regarded as a communist controlled union. At the hearing he made no secret of his feelings toward that union, indicating he would have stopped at nothing, even at closing his plant, to keep Local 65 out.

[fol. 368] C. *The Respondents enlist the aid of Joseph Tonelli of Local 318*

Maccaferri believed Local 22045 to be too weak to cope successfully with the organizational drive of Local (65—D & O p. 2, m. 2(2)), and came to the conclusion that the situation was serious enough to call for some action on his part. At the suggestion of a member of the Respondents' Board of Directors, Maccaferri consulted with an unidentified intermediary who arranged to have him meet with Joseph Tonelli; the head of Local 318, and a vice president of that Local's parent body, International Brotherhood of Pulp, Sulphite and Paper Mill Workers. Local 318 at that time was the bargaining agent for the employees of a neighboring plastics manufacturing company. Tonelli was recommended to Maccaferri as one who had been successful in the past in defeating organizational efforts of Local 65. Maccaferri first met with Tonelli about the middle of September, and thereafter, according to his own testimony, had a number of additional meetings and telephone conversations with him. He became convinced that Tonelli was a person upon whom he could completely rely.

Saul was first made aware of Tonelli's interest in the situation at the Respondents' plant at a meeting of the shop committee with Maccaferri in September 20, 1950, at which he was present.

Saul and the committee had earlier met with Maccaferri on September 7 to discuss a renewal of Local 22045's contract with a 12½ cent hourly raise.[3] At that meeting Mac- [fol. 369] caferri had stated he would consider it. A further meeting had been held on September 15. At that time Maccaferri had refused to discuss any wage increase until Local 65 was out of the way. He had also wrathfully accused Saul of encouraging Local 65 to engage in an organizational campaign as a pressure technique to force him to grant wage increments to the employees. When Saul had assured him that this was not true, Maccaferri had suggested that they work together to defeat Local 65, a proposal to which Saul readily agreed.

At the September 20 meeting, called to discuss the proposed raise, Maccaferri announced flatly that he did not intend signing any new contract with Local 22045 unless and until Tonelli approved it. Upon Maccaferri's insistence, Saul agreed to see Tonelli.

Several days later Saul called on Tonelli. At that time Tonelli indicated an interest in having his union take over the representation of employees at the Respondents' plant. There was some talk between them of jurisdiction, Tonelli asserting that jurisdictional rights in the plastic industry were properly lodged by the A.F.L. in his organization. As appears from Saul's testimony,[4] Tonelli at that time also broached the subject of a possible sale to his organization of representation rights in the plant, no price being mentioned. Saul did not definitely reject this suggestion at once, stating he would have to take up the matter with his union's executive board. Although Saul did not admit it, I am satisfied on all the record that he did, for a time at least, give serious consideration to the proposal. Maccaferri testified that shortly after Saul's first meeting with [fol. 370] Tonelli, he again met with Tonelli who told him that Saul wanted money to get out, and that Saul had

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[3] The demand at this time was an oral one. No written notice of intention to terminate or modify the existing contract was served on the Respondents until on or after September 29, 1950.

[4] Tonelli did not testify.

suggested the equivalent of a year's dues. Tonelli asked Maccaferri whether he would be willing to pay that amount. Maccaferri refused, according to his testimony, stating that any arrangements of such a nature would have to be made directly between Tonelli and Saul.

In any event, and whatever his reasons may have been for doing so, it appears that Saul eventually decided to reject Tonelli's proposal for the voluntary transfer of bargaining rights to his union. According to Saul, whose testimony is undenied and credited in that respect, he so informed Tonelli not long after, when Tonelli telephoned him to inquire concerning his decision.

On or about October 6, organizers for Local 318 appeared outside the Respondents' plant to distribute leaflets soliciting employees to join that union. Upon learning of the solicitation, Saul protested Local 318's action to both Tonelli and Maccafe i. Maccaferri's response was that Saul's union could no. handle Local 65 and that Local 318 could, and that it should be a matter of little concern to Saul since "it was all A.F.L." At Maccaferri's suggestion, Saul once more met with Tonelli, but what was said at their meeting is not detailed in the record. On October 12, Saul again discussed the subject with David W. Kahn, the Respondents' general counsel, and possibly also with Tonelli—the record is not entirely clear on this point. When Saul left the meeting at Mr. Kahn's office, it was with Mr. Kahn's assurance that the matter would be straightened out and that Saul had nothing to fear.

[fol. 371] After the meeting at Mr. Kahn's office, there was a cessation, or at least a suspension, of Local 318 activities, and for a brief time Local 22045 was able to concentrate on its efforts to combat Local 65's organizational campaign.

But Local 318 did not remain out of the picture for long. About a week after Saul's first meeting with Mr. Kahn—which would fix the date at about October 19—another meeting was held at Mr. Kahn's office. In addition to Messrs. Saul and Kahn, there were present Maccaferri and an attorney named Sapman, who, Saul was told, represented Maccaferri in labor relations work. No representative of Local 318 was present at that conference. The

purpose of the meeting soon became apparent. Shipman asked Saul whether he would be interested in withdrawing from the plant and allowing Local 318 to take over. Saul said, "No." Asked why Saul told Maccaferri that his "union derived its living from the dues, and that [it] had no intention of letting 318 or anybody else take over any of [its] plants." Maccaferri said, "I understand that 318 wants to compensate you for withdrawing." Saul asked if it was 318 or Maccaferri. Maccaferri said, "No, no, 318. I understand they want to buy the shop." Saul observed that if Local 318 wanted to buy the shop Maccaferri had no business knowing of it, and that it did not stand well with him that Maccaferri knew so much of what had gone on between him and Tonelli. Saul insisted upon an assurance that there would be no interference from Local 318 in the future. To that, Shipman finally responded, "All right, we will see to it that they stay away from the place." The events that were shortly to follow proved, however, that Maccaferri actually had other ideas—but of that, more later.

[fol. 372] D. *Local 22045 adds to its demands*

At a membership meeting of Local 22045, held on October 20, and attended by some 90 employees, all present who had previously designated Local 65 agreed to sign revocations of their designations of authority. At the same time resolutions were adopted formulating new bargaining demands. Among them was a demand for a 25 cent hourly wage increase, as contrasted to the 12½ cent increase previously demanded, and a demand for a 3 percent welfare fund. Also discussed at this meeting, but tabled for later consideration, was the question of whether affiliation should not be shifted back to Local 3127, the originally certified union. The new demands were not formally presented to Maccaferri until October 25. And there is no direct evidence that Maccaferri learned about them until then. Maccaferri, however, testified it was common for employees to come to him and apprise him of what was happening about the plant with regard to union activity, and from this it is reasonable to infer that what occurred at the October 20 meeting soon came to his attention.

E. *Maccaferri induces employees to engage in an organization campaign on behalf of Local 318*

On October 20, Virginia O'Neill who had been, and in fact still was, shop stewardess for Local 22045, but who had admittedly turned against that organization and was now hostile to it, told 4 other employees, Grace Cincimino, Al Montopoli (Grace's husband), Rose Amorosa, and Vernal Gibson[5]—that Maccaferri wanted them to meet with Tonelli [fol. 373] and help organize the employees into Local 318. An appointment had already been arranged by or for O'Neill for a meeting with Tonelli on Saturday, October 21—O'Neill's testimony was vague as to just how or when the arrangements had been made. On October 21, the 5 named employees called on Tonelli at the offices of Local 318. Tonelli spoke to them at length of the advantages of representation by Local 318, and, handing them a stack of membership application forms, emphasized the necessity of securing at least 75 signatures by the following Monday. The 5 employees were not scheduled to work that Saturday. However, after their visit to Tonelli they decided to return to the Respondents' plant to confer with Maccaferri. Maccaferri, when told where they had been, appeared neither surprised nor displeased; indeed one of his first comments, made even before they had brought up the particular subject, was to inquire whether they had obtained application cards from Tonelli. Maccaferri asked whether they, too, had not come to the conclusion that Tonelli was "a fine man," and observed that he himself would be inclined to give everything to Local 318, but nothing to Local 22045. After being informed that 75 cards had to be signed by the following Monday, Maccaferri took out a payroll, and together with the employees went over the list of names to determine who might be expected to sign. At one point, when O'Neill indicated some doubt as to whether 75 signa-

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[5] Vernal Gibson, who has since married, is now known as Vernal Gibson Fine, the name under which she testified. To avoid confusion with her husband, who also testified, she will be referred to in this Report by her maiden name.

tures could be obtained, Maccaferri firmly expressed his confidence that it could be done. And at another, when asked what if some didn't sign, Maccaferri remarked in substance, "If they don't sign, they know where the door is and they can get out." Maccaferri told the employees to be in early Monday morning so that Local 318 solicita-[fol. 374] tion might get underway promptly. And to Rose Amorosa, who had some reservations, Maccaferri stated as she was leaving, "Don't worry Rose, you won't regret helping me, everything will be all right."[6]

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[6] The findings made in the above paragraph are based principally upon the testimony of Rose Amorosa and Vernal Gibson, both of whom impressed me as essentially honest witnesses. Their account as to what occurred was disputed with regard to a number of details by O'Neill (who was still employed by the Respondents and was obviously hostile to the Charging Union), as well as by Maccaferri. O'Neill's testimony in certain respects was self-contradictory, and in others inconsistent with statements made by her in an affidavit supplied to the Board's field examiner who investigated the case. Her overall testimony left the impression that she was intent upon conforming her testimony to the Respondents' theory of the case, except where she was aware of inconsistent statements already made in her affidavit to the field examiner. To the extent her testimony is at variance with that of Amorosa and Gibson, I find it unreliable and unworthy of credence. Maccaferri in his testimony did not dwell on the incidents described above, nor attempt to deny them in detail. He testified that he first heard of Local 318 by number when the five employees came in to him that day to tell him, according to his version, that they had seen Tonelli who had indicated a lack of enthusiasm. Beyond that, his testimony would have it, he could recall nothing else, except that the girls had mentioned they were going to get cards signed, had expressed doubt whether they could do so in so short a time, and had been told by him that he felt they could do it if all employees felt as they did. In the light of all the surrounding circumstances, Maccaferri's testimony that he was unfamiliar with Local 318 until that time impressed

The employees' meeting with Maccaferri lasted about an hour and a half. At its end, O'Neill requested that the five employees be paid for that day. None had been in the plant before the meeting, and, except possibly for Montopoli, all left the plant immediately thereafter without performing any work. Nevertheless, Maccaferri readily acceded to O'Neill's request. The employees were compensated for a full 8-hour day at time-and-a-half rates.[7] By thus com- [fol. 375] pensating the employees, as well as by the statements made by him at the meeting, it is found Maccaferri gave substance and support to, and in effect ratified, O'Neill's assertion to the other employees that she had been authorized by Maccaferri to request them to engage in organizational activities on behalf of Local 318.

Maccaferri's efforts that day to induce employees to organize on behalf of Local 318 were not confined to the five employees named above.

Thus, Frank Squillate, an employee in the finishing department, testified that on that same Saturday afternoon Maccaferri approached him at his place of work and told him that he did not like the incumbent union; that he was paying it $500 a week that could better be distributed among the employees; that he would like to have Local 318 in its stead; and that he wanted Squillate, as one of the older employees in the plant, to talk about Local 318 to his fellow employees. Maccaferri specifically denied stating to Squillate that he was paying $500 to any labor organization or organizer. As to the balance of Squillate's testimony, he stated he could not "recall whether we had a conversation or not." Without resolving the question of whether Maccaferri made any specific reference to a $500 payment, I am convinced, and I find, that Maccaferri did urge Squillate to enlist support for Local 318 on the occasion mentioned by Squillate.

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me as implausible. In other respects I thought his testimony was wilfully incomplete. To the extent his version conflicts with that of Amorosa and Gibson, I do not credit it.

[7] Maccaferri's testimony at one point that the employees had worked until noon, and were paid for that reason, is at variance with clearly established record facts.

On the same day, Maccaferri also had a conversation along somewhat similar lines with another employee, Frank Ciccone, who was employed in the Respondents' machine shop, and who was the only employee working there that Saturday, Ciccone and another employee had earlier plant- [fol. 376] ed a baseless rumor with an employee whom they suspected of talebearing and wanted to test, that they were trying to bring the International Association of Machinists into the plant. The rumor had quickly found its way to Maccaferri. When Ciccone had asked Max. Studi, the machine shop fireman, for a raise shortly thereafter, Stadli had replied that Maccaferri was "sore" at all in the machine shop for trying to bring in the IAM. On Saturday, October 21, Ciccone made it a point to assure Maccaferri that there was nothing to the IAM story. Maccaferri then brought up the subject of Local 318. He told Ciccone a neighboring plastics manufacturing company was dealing with Local 318 and was happy with it, and declared his desire to bring that labor organization into his plant. Characterizing Local 65 as "communists" and Local 22045 as "gangsters and racketeers," he added that because of this he had determined not to deal with any but Local 318 in the future, and that he would close his doors rather than deal with either Local 65 or Local 22045. With Local 318 in the plant, he went on, he was sure everybody would be satisfied. Maccaferri informed Ciccone that on Monday morning, October 23, he was going to ask Peter Pieroni, another machine shop employee, to help in the campaign for Local 318, and expressed his desire to have Ciccone assist Pieroni in distributing Local 318 cards among employees. During their conversation, Maccaferri took occasion to announce to Ciccone, without, however, making any definite commitment, that there was a good possibility that Ciccone would eventually be made a foreman in the ukelele department.[8]

[fol. 377] As appears from Peter Pieroni's testimony, credited in this respect, at about 8:35 a. m. on Monday morning, October 23, Maccaferri came into the machine

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[8] The findings in this paragraph are based upon Ciccone's credited testimony which in the respects set out was not specifically denied.

shop, summoned Pieroni to the office, and told him in substance that Local 318 was the union he wanted as the collective bargaining agent of his employees. Maccaferri gave Pieroni some 40 Local 318 membership application cards and asked him to solicit signatures for them. When Pieroni inquired what would happen if employees refused to sign, Maccaferri replied that if they didn't sign they would be "out."[9]

F. *Events of October 23; the Respondents allow and support Local 318 organizational activities on company time*

Beginning at the start of the first shift on the morning of October 23, a vigorous organizational drive was conducted on plant premises on behalf of Local 318. The leader of the drive was Virginia O'Neill, with Frank Pieroni also playing a prominent part particularly in the machine shop. Other employees who it appears participated in varying degrees in obtaining signatures for Local 318 membership applications included Al Montopoli, Grace Cinciming, and Frank Ciccone. Activities were conducted largely during [fol. 378] the working time, either of the solicitors or the solicited, and O'Neill and Pieroni, at least, performed none

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[9] Maccaferri admitted having an interview with Pieroni concerning Local 318 on the occasion in question, but according to him, the interview was requested by Pieroni who voluntarily came to his office with cards in his hands to ask about Local 318. All he told Pieroni, Maccaferri would have it believed, was that he did not care what union the employees decided upon, as long as it was not a communist union. Considering all the other evidence in the record, I am unable to believe that Maccaferri expressed a position of neutrality as between Local 318 and Local 22045. Other undenied testimony convinces me that it was Maccaferri and not Pieroni who sought the interview. To the extent their versions are in conflict, I credit that of Pieroni and find that the incident occurred substantially as by him related.

of their regular work that morning,[10] although they were paid for their time at their regular rates. The solicitation activities were conducted openly in the presence of supervisors. Though it resulted in some disruption of regular production, the Respondents' supervisory and management officials made no effort to curb it.

In soliciting application for Local 318, the solicitors represented to the employees that Maccaferri wanted that labor organization; that it was the only union with which he wanted to deal; that it would result in economic advantages to them if they cooperated with him; and that it might result in job insecurity for them if they failed to sign.[11] Supervisory and management officials of the Respondents by their statements and conduct, to be described below, provided substance and support for these representations, thereby materially aiding the Local 318 solicitation activities.

One supervisor, William Ritacco, actually joined in the solicitation activities in the molding department, where he was foreman, by receiving cards from O'Neill, himself openly signing one in the presence of employees, and dis- [fol. 379] tributing others to a number of employees in his department with instructions to fill them out.[12]

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[10] Although O'Neill testified that she confined her solicitation activities to nonworking time, there is overwhelming record evidence to the contrary and her testimony is not credited.

[11] This is established by credited testimony of Rose Amorosa, Carmen Libutti, Frank Ciccone, Antoinette Radice, Frank Squillate, Louis Castaldo, and Evard Green. O'Neill's denial that she made any reference to Maccaferri or to his desires in the matter is not credited.

[12] This is established not only by the testimony of Amorosa, Gibson and Castaldo, witnesses for the General Counsel, but also by admissions of Ritacco, a witness for the Respondents. O'Neill denied giving cards to Ritacco, but her denial is inconsistent with her affidavit, and is not credited. Ritacco's attempted justification for his conduct—that he was simply seeking to hasten the return of molders

Others, although not joining in the actual distribution of cards, made no secret of what the Respondents' desires were with regard to Local 318, and provided assistance to the campaign in other ways. Thus, in the machine shop, Maccaferri entered the room while Pieroni was addressing employees in an effort to have them sign, saw the employees standing about idle, and, instead of asking them to return to work, contributed to Pieroni's efforts by remarking that he would like to have them join and that they would be satisfied if they did. One employee, Albino, who, as a salaried maintenance man, had never been required to join the contracting union, specifically inquired of Maccaferri whether it would be necessary for him also to join, and Maccaferri told him it would.[13] In the packing department, Mrs. Maccaferri, addressing a number of employees generally, told them that it was all right to sign for Local 318; that her husband knew about it; that it was a good union and had a good contract; and that they would not be able to work in the plant in the future unless they joined.[14] In [fol. 380] the ukelele department, Forelady Alma Zwoboda told employee Estello Sills, while the latter was being solicited for Local 318 membership on company time by Grace Cincimino, that Local 318 was the union Maccaferri wanted and the one whose demands he would meet.[15]

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to their machines—impressed me as implausible in the light of all the surrounding circumstances, particularly his own ostentatious signing of a card.

[13] The above findings relating to the machine shop are based upon testimony of Ciccone, Pieroni and Libutti, not specifically denied and credited in these respects.

[14] This finding is based upon credited testimony of Jean Bowerman and Elizabeth Petrus, employees in the packing department. Mrs. Maccaferri in her testimony did not refer specifically to this incident. She testified generally, however, that she could not recall having a conversation with anyone about Local 318. Her testimony was unconvincing, and is not credited.

[15] This finding is based upon the credited testimony of Sills, denied by Zwoboda. According to Zwoboda, she had

As a result of the concerted drive carried on that morning, with the acquiescence, assistance, and support of management representatives, the Local 318 campaign achieved a spectacular success, which in the circumstances is not to be wondered at. Upwards of 70 membership application cards were collected. These were given to O'Neill who made it a point to inform Maccaferri of what had been accomplished. At about noon, the cards were turned over by O'Neill to official Local 318 representatives who were waiting for them outside the plant.[16] On the following day, October 24, Local 318 intervened in the representation case that had been instituted by Local 65, filing approximately 73 authorization cards.

[fol. 381] Maccaferri was not slow in expressing his appreciation for the services O'Neill had performed. Vernal Gibson testified without specific contradiction, and it is found, that during the afternoon of October 23, Maccaferri in her presence, congratulated O'Neill on the good job she had done that day. He further told O'Neill she

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returned to the plant that morning after a period of absence, and had no knowledge of any union called Local 318. Zwoboda's testimony in that respect conflicts with a sworn statement she gave the Board's field examiner, wherein she in effect admitted her familiarity with Local 318 at that time. Moreover, there is other evidence tending to corborate Sills. Thus, another employee, Ruth Shaw, testified without direct contradiction that on October 23, she inquired of Zwoboda whether to join Local 318, and was told that all foremen and foreladies would be in Local 318 and that it would be "a good deal" for employees who would thereby get what they wanted.

[16] Maccaferri admitted, after being shown his prehearing statement, that earlier that morning he had been in telephone communication with Tonelli. According to Maccaferri, Tonelli advised him at that time that "although he cannot yet foresee how he can represent the people, and he would like to know whether he would be accepted, he informed me cards were given to the employees, and he said, 'Let's see the reaction of the majority.'"

need not worry, that some day he would take her to Florida.[17]

G. *Additional interference, assistance, and support between October 23 and November 10*

After the events of October 23, there was apparently little active solicitation on behalf of Local 318. The record, however, does disclose at least two additional relevant incidents to which reference should be made.

On or about October 26, Estelle Sills had a conversation with Grace Cincimino and Forelady Zwoboda in which she

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[17] On the following day, October 24, a regular payday, O'Neill received over and above her wages a check from the Respondent, Mastro, for $50. The General Counsel contends this represented a reward for her work on behalf of Local 318. The check was endorsed, "Extra work on plumes." O'Neill testified that some weeks before she had been given a special "plume" job to be performed on her regular working time. When she had been assigned that work, Maccaferri had told her it would be worth $50 if she saved a certain amount of material. *He* testimony continued: At the time she was given the job Maccaferri had made no definite commitment to pay her $50. When she had satisfactorily completed the work, she had forgotten about what Maccaferri had told her and had not pressed him for payment. However, the check she received on October 24 was considered by Maccaferri and by her as a discharge of Maccaferri's obligation to her for special services rendered in connection with the "plume" job, and not as a reward for what she had done on behalf of Local 318. O'Neill's explanation—considering the timing of the payment in relation to the surrounding circumstances—is not entirely convincing. It is nevertheless not so inherently implausible as to warrant rejection. There is no positive evidence to rebut her explanation, and other surrounding circumstances, while giving rise to a suspicion that the payment may have been connected with Local 318 activities, are not in my opinion sufficient to warrant an inference to that effect. Consequently, I reject the General Counsel's contention in this respect.

[fol. 382] disclosed to them that she had renounced her designation of Local 318. Both Cincimino and Zwoboda told her that she was foolish not to stick with Local 318 as it might cost her her job.[18]

During the week of October 23, there was a meeting of Local 318. O'Neill requested Luis Cartagena and another employee who worked on the 4 p.m. to midnight shift to attend the meeting. Cartagena asked if it would be all right for him to attend during his working hours. O'Neill said she would take it up with Maccaferri. Later the two employees were advised by their foreman that they could go to the meeting and would probably be paid for the time lost. Both Cartagena and the other employee, Richard Pelley, clocked out at 5 p. m. and did not return to the plant until after the conclusion of the meeting, more than 2 hours later. Both were compensated for that full day, just as if they had not left the plant.[19]

II. *The Local 22045 membership votes to transfer its affiliation to Local 3127*

Upon learning of the events that had occurred on October 23, Saul arranged an emergency meeting of the Respondents' day shift employees to be held after work that day under the auspices of Local 22045. At the meeting, which Saul says was attended by about 90 day shift employees, a resolution was adopted to transfer the affiliation of the membership back to Local 3127, the originally certified collective bargaining representative. The transfer was de-[fol. 383] cided upon, according to Saul, because Local 3127 was believed better equipped to handle the welfare fund the employees were then demanding, and because it was further believed that Local 3127, with the support of an international behind it, was in a stronger position to resist the raiding of Local 318. At this meeting, a decision was also reached to present to Maccaferri the demands previously formulated by Local 22045 at its meeting on October 20. There was also some discussion of a strike if the

[18] According to Sills' credited testimony, denied by Zwoboda but not by Cincimino.

[19] The facts concerning this incident are undisputed.

demands were not met, but on that point no action was taken.

On October 25, Saul, Rothenberg and a committee of employees called on Maccaferri to present the demands previously formulated by Local 22045. At that time, Saul, according to his credited testimony, informed Maccaferri of the decision to reaffiliate with Local 3127. Maccaferri's only comment was, "I know all about it. I know everything that took place at the meeting." As for the demands, Maccaferri indicated he considered them outrageous. There was no attempt at negotiations that day. Maccaferri stated he would take the Union's demands under advisement and let the Union have an answer in a few days.[20]

On October 26, a further meeting of Local 22045 was held, this time attended by fewer employees. Employees present were asked by Saul to sign forms revoking desig- [fol. 384] nations given to Local 318, and also to sign membership applications for Local 3127. How many of these were signed that night, the record does not disclose. A decision was reached at that meeting to solicit additional signatures from employees at the plant.

On October 31, at a conference at the Board's Regional Office held in connection with the pending representation proceeding in which Local 318 had intervened, Local 22045 refused to consent to an election on the ground that the Respondents had unlawfully assisted Local 318. Two days later, Local 22045 filed unfair labor practice charges against the Respondents in Case No. 2-CA-5658.

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[20] Saul's testimony of what occurred that day is substantially corroborated by testimony of Amorosa, Gibson, and Pieroni. Maccaferri denied hearing any mention of Local 3127 at that meeting. According to him, he first heard Local 3127 was back in the picture when it was mentioned to him by Saul in a telephone conversation on November 9. Particularly in view of Maccaferri's own testimony elsewhere in the record indicating that employees voluntarily kept him abreast of union activities, I am unable to believe that knowledge of Local 3127's reentry on the scene could have been so long delayed in reaching him. I believe he made the statement attributed to him by Saul.

A further meeting of Local 22045 (or Local 3127) was held on November 6. There was general discussion of what Maccaferri intended to do with regard to the Union's contract demands, and of what action should be taken by the Union. It was agreed that if the Union could not come to a determination with Maccaferri, there would be a strike. However, no strike vote was taken and no strike date set. The matter was tabled for consideration at a meeting to be held the following week.

About a day or so later, Saul received an invitation to the office of Mr. Kahn to confer with Maccaferri. At the meeting, held on November 8, Maccaferri told Saul he could forget about Tonelli and Local 318. As for the terms of the contract, Maccaferri stated he thought the Respondents might grant a 10 cent hourly increase, but that he wanted to defer final decision on contract conditions pending receipt a report from his auditor.[21]

[fol. 385] Saul left the meeting at Mr. Kahn's office with the impression that the differences between his union and the Respondents would be adjusted amicably. However, Maccaferri must have come to a different conclusion during the next 2 days, because on the morning of November 10, he posted a bulletin board notice to employees reading as follows:

> It has been rumored that on Monday morning, November 13th, there is going to be a strike of the employees.
>
> Any employee who will go on strike on Monday will forfeit his or her right to their jobs, because they will be in violation of the present union contract.
>
> We will have no alternative but to replace each and every worker who goes on strike on Monday.

I. *The discharge of Frank Ciccone on November 10, 1950*

Before his discharge on November 10, 1950, Frank Ciccone was in the Respondents' employ continuously for

[21] These findings are based upon credited testimony of Saul, disputed in part by Maccaferri. Mr. Kahn did not testify.

some 4½ years, except for one brief interruption.[22] He worked as a machinist in the machine shop but also performed maintenance work, his maintenance assignments taking him to other departments of the plant, particularly to the packing room where it was his function to keep certain assembly machinery in a state of repair. As appears from the testimony of Max Studli, foreman of the machine shop, Ciccone was regarded as an able and conscientious worker.

[fol. 386] Ciccone had not been prominent in union affairs before Local 318 came upon the scene. It will be recalled, however, that at one time Maccaferri had suspected Ciccone of organizing for the I. A. M., and, on October 21, upon being assured that he was in error, had urged Ciccone to help organize employees in the union of Maccaferri's choice. On October 23, Ciccone had engaged in Local 318 solicitation activities conducted on company time, but, according to his testimony, had done so reluctantly and in opposition to his convictions. Shortly thereafter he had regretted his action, and at the meetings of Local 22045 held that week he had been in the forefront of those critical of the attempt to bring "the boss' union" into the plant.

After the decision was reached at the membership meetings of Local 22045 to transfer back to Local 3127, Ciccone undertook to solicit employees at the plant for membership in Local 3127. During the week in which he was discharged, Ciccone became very active in that respect. Ciccone, who impressed me by and large as a forthright witness, testified that he confined his solicitation activities to nonworking time, such as during lunch hours and rest periods, and there is no credible evidence of probative force to the contrary.[23] The record is clear that Maccaferri and

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[22] The interruption had occurred about 2 years before when Maccaferri had criticized certain work of Ciccone, using profane and abusive language, Ciccone in anger had replied in kind, and Maccaferri had ordered Ciccone from the plant for insubordination. After several weeks absence Ciccone had been induced by Max Studli, his foreman, to return to work.

[23] Contrary testimony of Maccaferri and O'Neill is found

[fol. 387] other management officials were aware, at least by November 10, of Ciccone's organizational activities in opposition to Local 318. Indeed, Maccaferri virtually admitted as much when he testified that Ciccone before his discharge was "more than suspected" of engaging in solicitation activities for Saul's union—according to Maccaferri, however, he thought it was for Local 22045 rather than Local 3127.

On November 10—testimony of the Respondents' witnesses discloses—Ciccone became an object of special attention. O'Neill testified that on that day she spoke to Mrs. Maccaferri about Ciccone, making the charge that Ciccone was soliciting employees in the packing room and disturb-

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unreliable. At one point, Maccaferri testified he saw Ciccone with cards in the packing room, but in almost the next breath he contradicted himself, stating he did not know whether or not Ciccone had cards with him. Maccaferri also gave testimony that Ciccone was going around from machine to machine soliciting employees, interfering with their work and disrupting production. His testimony in that regard, however, was vague, unsupported by specifications of detail, and generally unconvincing. Moreover, cross-examination developed that much of what he was testifying to purportedly from personal knowledge was not observed by him at all, but was based upon reports he said were made to him by his wife. Significantly, Mrs. Maccaferri, while testifying, was not called on to corroborate her husband's obviously hearsay account. Nor did anyone else, except O'Neill whose testimony throughout revealed a disposition to conceal facts that might aid, and to exaggerate facts that might injure, the Charging Union toward which she was bitterly antagonistic. The unreliability of her testimony on this particular point is illustrated by the fact that, according to her, Ciccone on November 10 was busy throughout the day, *including the afternoon*, up to the time of his discharge, in soliciting employees in various departments. This is inconsistent with otherwise undisputed evidence showing that in the afternoon of that day, Ciccone did not leave his bench in the machine shop at all, except for the visit to the Coca Cola machine, hereinafter related, which immediately precipitated his discharge.

ing their work. Maccaferri's testimony reveals that a report to that effect was made to him by his wife, although, apparently, O'Neill was not disclosed as the source of information. Maccaferri's testimony further reveals that his attention was also directed to the fact that Ciccone and another employee, Pete Pieroni, who was now also active in behalf of Local 3127, had spent their noon hour going through various departments in the plant engaging in "this big activity," as Maccaferri referred to it at the [fol. 388] hearing. According to Maccaferri, he became disturbed by what he characterized as the "unrest" in the plant, and decided that something would have to be done about it.

About 1 o'clock that afternoon, immediately after the lunch period, Maccaferri approached Ciccone in the machine shop where he was working at a bench alongside Pieroni. Following is Ciccone's credited version of what occurred:

> He came over to the spot where Pete [Pieroni] and I were standing and again he went into this business of being wise to us and he was sorry he hadn't stopped me sooner. He says, "I want you to leave my people alone, you have been going around signing them up with 3127, they have already signed with 318; why don't you let things be. They have made up their minds already."
>
> I told him they hadn't, he was making up their minds for them. He says to me "You just mind your God damn business and remain in the machine shop. From now on your work is going to be in the machine shop. You will not do any more maintenance work." I says, "But I have to leave the machine shop to do my work." He says, "You work in here. We will find work for you in here steady."[24]

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[24] Ciccone's version was corroborated by Pieroni. According to Maccaferri, he simply told Ciccone, "Look, Frank, you have had yesterday and to-day to do what you wanted to do. I don't know it and I don't want to know it but from now on you stay at your bench." Studli, who was

Thereafter, in accordance with Maccaferri's instructions, Ciccone remained at his bench in the machine shop until approximately 2:30 p.m.

[fol. 389] Under existing collective bargaining agreement employees were permitted two 10-minute rest periods each day. In certain departments the rest periods were set at fixed times and were signalled by the ringing of a bell. In the machine shop there were no definitely set periods. It was customary, however, for employees in that department to take their afternoon "break" at about 2:50 p.m., the time of the regular "break" in other departments.

About 2:50 p.m.—perhaps a minute or two before—Ciccone together with Pieroni and Libutti, and possibly some other machine shop employees following them but not in the same group, left their places of work in the machine shop to go to the Coca Cola machine which was located in the molding room. There was nothing unusual about this, except possibly for the number of employees who left the machine shop at approximately the same time. Max Studli, the machine shop foreman, made no complaint. In order to get to the molding room, it was necessary for the employees to walk through the packing room where Mrs. Maccaferri had her desk. Mrs. Maccaferri testified that they marched through this room like "storm troopers," attracting considerable attention. She experienced great difficulty, however, in explaining what she meant by this. The weight of credible evidence is to the effect, and I find, contrary to her conclusionary statement, that they walked through in an ordinary manner without anything unusual in their demeanor or conduct. If their passage attracted the notice of other employees, as it did that of Mrs. Maccaferri, it was not because of anything they said or did. The machine shop employees who testified denied that they said anything to employees in the packing room or engaged in any untoward conduct that might tend [fol. 390] to create a disturbance, and there is no credible

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present, and who testified as to witness for the Respondents, did not dispute the details of Ciccone's version, testifying simply that Maccaferri ordered Ciccone not to leave the machine shop, and ordered Studli to fire him if he did.

evidence to the contrary.[25] From the packing room Ciccone and the others went into the molding room, to the Coca Cola machine, where they obtained and drank refreshments, remaining there from 5 to 7 minutes, and then returned directly to their stations of work. There is no claim that they engaged in any union solicitation activities while they were gone.

O'Neill, her testimony reveals, believed the employees had come to the Coca Cola machine to hold a meeting of some kind. She did not deny that, upon observing Ciccone and the others enter the molding room, she again spoke to Mrs. Maccaferri to call it to her attention and to ask her what she proposed to do about it.[26] Mrs. Maccaferri, had remained in the packing room and did not know what if anything was occurring in the molding room. Without making an investigation to find out, she at once telephoned her husband who was then absent from the plant at a board of directors' meeting.[27] Informing him that the machine shop employees had walked by, she expressed apprehension that "something is going on." Maccaferri, also without investigating, moved hastily. Asking to be connected with [fol. 391] Personnel Manager Arthur Zevin and with Foreman Studli, he instructed them to discharge Ciccone at

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[25] O'Neill's unsupported testimony, that when the men marched through it created a "lot of confusion," that employees "probably" left their work before the rest periods to talk to the men, and that people were "stunned," impressed me as wholly imaginative and unworthy of credence.

[26] Although Mrs. Maccaferri testified on direct that she did not see O'Neill, on cross examination, when her attention was directed to O'Neill's contrary testimony, she stated she could not remember.

[27] Mrs. Maccaferri's testimony that she did not call her husband but he called at just this time, is implausible. Maccaferri, although he later sought to alter his testimony to conform to that of his wife, had earlier testified as an adverse witness that he received the call from Mrs. Maccaferri. O'Neill also testified that she saw Mrs. Maccaferri make a call at this time, although she professed not to know to whom.

once. All this occurred during the 5 or 7 minute interval during which the machine shop employees were at the Coca Cola machine.

As soon as the employees reentered the machine shop, shortly before 3 p.m., Studli approached Ciccone to tell him that he had just received a telephone call from Maccaferri, and that he had to fire him, Ciccone asked for the reason, and Studli, apparently expressing it as his own opinion, stated he believed it was for union activity.[28] Shortly thereafter Zevin came in and paid Ciccone off. When Ciccone inquired why he was being treated in that manner, Zevin curtly replied, "Get the hell out and keep your mouth shut." Ciccone left the plant at or shortly after 3:13 p.m.

J. The work stoppage and other events on November 10, 1950, following Ciccone's Discharge Discharge

Within about 10 minutes after Ciccone's discharge, the other employees in the machine shop walked out. As to the events immediately preceding the walkout, the testi- [fol. 392] mony is in conflict. The resolution is important, because on it may turn the question of whether the employees were locked out, as contended by the General Coun-

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[28] The finding concerning Studli's statement is based upon Ciccone's credited testimony, corroborated by Pieroni and Libutti. Studli testified he was not sure whether he gave Ciccone a reason for his discharge, and at another point, that Ciccone did not ask for a reason. Studli's denial that Ciccone asked for a reason impresses me as implausible. Studli's own testimony reveals that he himself believed the action taken against Ciccone's that day had some connection with Ciccone's union activities. Studli had always been friendly with Ciccone, he himself had always remained aloof from the union conflicts in the plant; and he impressed me as a person naive in labor relations and unsophisticated in the applicable law. Under all the circumstances, I think it altogether probable that he expressed to Ciccone the personal opinion which Ciccone attributed to him and which Studli in his testimony did not categorically deny.

sel, or simply engaged in a strike, as contended by the Respondents.

Pieroni testified that, as committeeman for the machine shop, he questioned Zevin about Ciccone's discharge at or immediately after the time Zevin handed Ciccone his final check. Pieroni's account of what was said was as follows:

> I asked him [Zevin] why was he fired. So Mr. Zevin said "Because of trying to get people to sign with 3127. You know the boss wants 318, and whoever doesn't like it can get the hell out with Frank." So I asked him if that meant we had to take the boss' union and not the one we wanted. And he asked me if I was getting technical, "If so, it is pretty plain . . . the boss wants 318 and anyone who doesn't want it can get out."

Upon hearing the last statement, according to Pieroni, he and the other employees of the machine shop punched out and left the plant.

Pieroni's account was supported by Libutti whose testimony concerning the conversation followed that of Pieroni in substantially identical words. Although the conversation, according to Pieroni and Libutti, was loud enough to have been overheard by all present in the machine shop, no other employee of that department was called as a witness, except Ciccone. Ciccone testified that he himself did not hear the conversation, having been "so mad [he] didn't know what was going on," but that he was told of the conversation by Pieroni, upon returning from the locker room where he had gone to gather his belongings after being paid off.

[fol. 393] Zevin, although not denying he had a conversation with Pieroni on the occasion in question—the details of which he stated he could not recall—was emphatic in his assertion that he made no reference to Local 318 or to Local 3127 or to Ciccone's union activities as the cause of the discharge. He was equally positive he did not announce that anyone who did not want Local 318 could get out. He knew, he explained, that Ciccone had been engaged in union activities, and was aware also that the discharge was a "ticklish" one. For those reasons, and because he had

some knowledge of the law of labor relations, he was especially careful not to involve himself, and was therefore certain he did not make the statements attributed to him.

At the time of the hearing Zevin was no longer employed by the Respondents, and was wholly disinterested in the outcome of the case. His over-all testimony revealed no propensity to shape his testimony to conform to the Respondents' theory of the case. On the particular point in issue, his testimony seemed to me to be plausible, and his demeanor in giving it to carry the stamp of sincerity. And while, it is true, neither Pieroni nor Libutti impressed me as wilfully dishonest, I am inclined to the view that in the excitement of the occasion and of what followed it they may have confused what was said by Pieroni with what was said by Zevin. I think it possible that Pieroni accused Maccaferri of firing Ciccone because he wanted to inflict Local 318 on the employees, persisting in this accusation to the point where Zevin, seeking to put an end to the interview, told Pieroni in irritation that he could get out if he did not like it, and that Pieroni and Libutti were thus led to believe Zevin was agreeing to the accusations. In any event, I am not entirely satisfied on all the [fol. 394] testimony that Zevin's denial is not to be credited. Consequently, I accept it.

A report of Ciccone's discharge, and of the walkout of the machine shop employees following it, was promptly communicated to Saul. Arriving at the plant at about 4 p.m., Saul established a Local 3127 picket line. In the meantime news of the occurrence spread rapidly throughout the plant, and before the end of their shifts a substantial number of employees in other plant departments left the building to join the work stoppage.

In the molding room, the employees on the first shift—7:30 a.m. to 4 p.m.—continued working until their regular quitting time. At the end of the shift, Rose Amorosa and Vernal Gibson asked Ritacco, their supervisor, why Ciccone had been discharged. They were told it was because of his activities on behalf of Local 3127, and that anyone else who went along with that local could expect like treatment.[29]

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[29] This finding is based upon mutually corroborative testi-

In the buffing room of the finishing department, supervised by Alma Zwoboda, news of Ciccone's discharge and [fol. 395] of the machine shop walkout reached the employees between 3:30 and 4 p. m. The department was located in a separate section of the plant facing the street. A request by Ciccone and Pieroni for others to join them was shouted to an employee inside the plant, and by him transmitted to other employees in the department. Upon receiving the news, the men in the finishing department left the plant in a group, joining the picket line outside. This was about an hour before their regular 5 p. m. quitting time.[30]

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mony of Amorosa and Gibson, both of whom impressed me generally as credible witnesses. Ritacco denied speaking to them, or, for that matter, to anyone else that day about the strike or walkout. But his denial was materially weakened by his admission on cross-examination that employees did come to him to inquire about what had happened in the machine shop, and his further admission that he "probably" told them Ciccone had been fired. Ritacco insisted he could not have made the statement attributed to him because he was unfamiliar with both Local 318 and Local 3127 by number and completely disinterested in the plant's union conflicts. His testimony in that respect is wholly implausible when considered in the light of the evidence above set forth showing his own membership and activities on behalf of Local 318. Although Ritacco was no longer employed by the Respondents at the time of the hearing, a factor considered, his over-all testimony disclosed a marked inclination to "cover up" for the Respondents. His denial is not credited.

[30] One employee in this group, Francisco Tomarello, testified that before the walkout the employees in the buffing and ukulele rooms of the finishing department were called together by Zwoboda and addressed by her and O'Neill. His testimony, contradicted in that respect, is not borne out by testimony of other finishing department employees, and is discredited. Another employee, Frank Squillate, testified that he walked out because Zwoboda told him the machine shop employees had been discharged for not accepting Lo-

In the ukulele room of the finishing department, the girls remained at work until about 4:30 p. m., when all but three of them walked out to join the picket line. When a rumor of Ciccone's discharge first reached the ukulele room, employee Estelle Sills asked Forelady Zwoboda whether it was true. Zwoboda confirmed the rumor, stating that Ciccone had been fired for union activities, and adding that the others in the machine shop had walked out in protest and as a result had also been discharged.[31] As appears from Sills' credited testimony, the girls in the ukelele department decided to walk out in order to protest Ciccone's discharge. Before they left, Zwoboda spoke to them, urging them to stay. It was foolish for them, she said, to [fol. 396] walk out with Local 3127 rather than to remain in the plant with Local 318. Maccaferri wanted Local 318, she told them, and they could expect their demands to be met only through that union. But, warned Zwoboda, if they went along with Local 3127 and joined its strike, it would mean the loss of their jobs, for in that event they would automatically be fired under the contract.[32]

In the packing room, directly supervised by Mrs. Maccaferri, the employees learned of Ciccone's discharge about 20 minutes after it occurred. At that time about three or four of the employees left the plant. The others continued to work until their regular quitting time at 5 p. m.

According to the credited testimony of employee Jane

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cal 318, and that he also would be discharged unless he signed up with that local. Squillate under cross examination revealed such confusion, vacillation, and uncertainty as to cast doubt on the reliability of any of his testimony on this point. Consequently, his testimony relating to his asserted conversation with Zwoboda is rejected.

[31] This finding is based on crediting testimony of Sills, not specifically denied by Zwoboda.

[32] The findings concerning Zwoboda's remarks are based upon a synthesis of credited testimony of Sills and Ruth Shaw. Zwoboda did not specifically deny making the statements they attributed to her. To the extent that other testimony of Zwoboda may be construed as a denial, her testimony is not believed.

Bowerman, Mrs. Maccaferri told her, "Frank [Ciccone] is not here no more. He's just been fired for making trouble with 3127. And if anybody else starts the same thing, they'll be just like him."[33]

At the close of the shift that afternoon, Mrs. Maccaferri spoke informally to the employees as they were leaving. There is no unanimity among the General Counsel's witnesses as to the details of what she said. According to Bowerman, Mrs. Maccaferri stated that the plant would be open the following day, that they should do what she told them to do, and not be foolish like the others who had walked out. Another employee, Elizabeth Petrus, testified that Mrs. Maccaferri urged them not to join the strike, [fol. 397] pointing out that her husband had built the plant and was going to run it his way without having any trouble-makers in it. In addition, testified Petrus, Mrs. Maccaferri told them that if they did not sign up with Local 318, which her husband knew to be a good union, they would not work there at all. Another, Lillie Maddalina, testified Mrs. Maccaferri stated that her husband built the plant, that no one was going to tell him what to do, that he was going to bring in any union he wanted, and that he wanted Local 318. Still another, Vernal Gibson, not employed in that department but present at the time, testified that Mrs. Maccaferri stated that her husband wanted Local 318 and no other union, and that those who didn't like it could get out and stay out.[34]

Mrs. Maccaferri denied saying anything at all on this occasion, either in connection with the strike or otherwise. I do not credit her. On the basis of my appraisal all the testimony and the witnesses giving it, I believe, despite the variances in the witnesses' recollections of what was said, that Mrs. Maccaferri did express her views concerning then

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[33] Mrs. Maccaferri's denial that she had any talk with Bowerman that day was unconvincing and is not credited.

[34] Another employee, Antoinette Radice, also testified on this subject, stating that Mrs. Maccaferri said that anyone who did not join Local 318 would be fired like Ciccone. Radice's testimony, however, was otherwise impeached, and is not relied on.

current occurrences. I believe, and I find, that Mrs. Maccaferri urged them not to join the strike, as reflected by the testimony of Bowerman and Petrus; that she indicated her husband's determination to see Local 318 became the collective bargaining representative in the plant, as reflected in substance by the testimony of Petrus, Maddelina, and Gibson; and that she indicated it would be foolhardy and useless for them to attempt to oppose her husband's will, [fol. 398] as reflected to some extent by the testimony of all the above-named witnesses. I am not persuaded, however, that Mrs. Maccaferri told the employees they could work there no longer if they did not sign up with Local 318. To that extent I reject Petrus' uncorroborated testimony.[35] Moreover, while I believe Gibson's testimony that Mrs. Maccaferri made a statement generally to the effect that those who did not want to go along with her husband "could get out and stay out," I do not think the remark was intended as an instruction to the employees to whom it was addressed, or so understand by them, but rather as a show of bravado.

The employees on the second molding shift—3:30 p. m. to midnight—came to work before the picket line was established. None left before the end of the shift. Ritacco, who normally worked the first shift, stayed on that night for the second at the request of Maccaferri. During the course of the evening, Ritacco came through the molding room to announce to the employees individually that Maccaferri desired to address them before quitting time. According to the credited testimony of one employee, Luis Cartegena, Ritacco told him that Ciccone had been fired, adding in substance that Maccaferri would fire anyone who did not adhere to Local 318.[36]

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[35] Mrs. Maccaferri's main interest at that time was not to solicit membership for Local 318. Petrus' testimony suggests that she may have confused in her recollection a statement to that effect made to her by Mrs. Maccaferri on October 23.

[36] Ritacco, in his testimony, did not specifically refer to this incident. His general denial that he discussed union with anyone that day, or made any statements of like import, is not believed.

Toward the close of that shift, Maccaferri assembled and addressed the molding room employees for about 15 min- [fol. 399] utes. Three witnesses testified for the General Counsel on that subject—Cartegena, Ralph Prieto, and Morris Brender. Their testimony, although varying as to details, dovetails in broad outline with respect to most matters. They are in general agreement that Maccaferri castigated Local 3127 as a racketeering union; emphasized his unwillingness to have anything to do with that union or anyone connected with it; expressed his own favor for Local 318, saying, according to Cartegena, that Local 318 was a better and stronger union, the acceptance of which would enure to the benefit of the employees; and warned of the consequences that would flow from nonacceptance of Local 318 and continued adherence to the old union. More specifically on the last point, Cartegena and Prieto testified Maccaferri told the employees in substance, that if they did not leave the old union alone and sign up with Local 318, they should not or could not come back to work. According to Brender's version, Maccaferri told them that if they wanted to work there they should take Local 318, otherwise they would find themselves without jobs. On the question of whether Maccaferri made reference in his remarks to the notice posted that morning announcing that a breach of contract strike would result in job forfeiture, Prieto had no recollection; Cartegena remembered that he did, although his recollection was confused as to what was said; and Brender agreed that Maccaferri mentioned they would be fired for breaching the contract if they joined the strike.

According to Maccaferri, his address was designed to urge his employees to decide on a single union—other than Local 65—so that plant production might settle down, to advise them that the strike was in violation of the existing [fol. 400] contract and unlawful, and to warn them that they would lose their jobs if they joined it. Although he would have it that he expressed no preference among the competing unions—other than to declare his abhorrence of Local 65—his own testimony on cross clearly contradicts him in that regard. Thus he admitted that, while characterizing Local 65 as "communists," he also characterized the incumbent

union as "racketeers" and "contract breakers." He further conceded that he might have interpolated in his remarks that employees should see to it that they were not represented by "communists or racketeering unions"; that Local 318 in contrast was a "decent" union; and that Local 318 was the union he would be willing to sit down and deal with at any time.

Except in one respect, Maccaferri's own testimony appears to me to substantiate that of the General Counsel's witnesses. The point of conflict is whether Maccaferri told the employees not to come back to work unless they abandoned the old union and signed up with Local 318, as testified to by Prieto and Cartegena, or whether he simply warned them they would lose their jobs if they breached the contract by joining the strike. On all the evidence, I am convinced that the truth lies somewhere in between. Maccaferri impressed me as a person given to violent temper and unrestrained expression. His own testimony substantially concedes that he utilized the occasion to voice his approval for Local 318, while expressing his bitter antagonism toward the union which was then picketing the plant. In his remarks he coupled the latter union with Local 65, toward which his admitted attitude has always been that he would close his plant rather than deal with it. Under all the circumstances, I do not believe Maccaferri [fol. 401] stopped at the point of warning his employees of the consequences of a contract violation. I think it entirely likely that in expressing his equal dislike for the incumbent union and Local 65, he declared his disposition to close the plant before dealing with either of them. From this, joined with his expression of friendliness for Local 318, the employees might reasonably have drawn the impression that if the plant was to remain open and their jobs secure, they should choose Local 318 rather than Local 3176. That in substance is Brender's testimony, and I credit it. I am not persuaded, however, that Maccaferri couched his remarks in the language of Prieto and Cartegena, i. e., in the form of an instruction to the men not to return to work unless they signed with Local 318. Both these witnesses disclosed while testifying that because of English language difficulties they had either a confused recollection of what

Maccaferri actually did say or else an inadequate power to report it. What they testified to may well have represented the over-all impression they formed. But I am nevertheless not convinced on the basis of all the evidence that the record justifies a finding that Maccaferri in his address actually conditioned the continuation of further job status upon affiliation with Local 318 before the next working day. To the extent that Cartegena's and Prieto's testimony may be read as implying as much, I do not accept it.

K. *Events after November 10, 1950; the discharge and subsequent refusal to reinstate the employees named in the complaint.*

On November 11, 1950, a handful of the Respondents' employees reported for work across the picket line. On that day Saul intimated to Maccaferri that violence might result if any employees continued to cross the lines. There-[fol. 402] after the Respondents' plant operations were virtually shut down until about December 11, when, as will more fully appear below, there was a back-to-work movement led by O'Neill with the backing of Local 318.

There is a conflict in the testimony as to what negotiations, if any, occurred between the Respondents and Local 3127 during the period of the work stoppage. Maccaferri stated that after the stoppage began, Local 3127 never demanded any conference and never—until March 4, 1951—offered to return employees to work. Saul's testimony is to the contrary, and in the main I credit him over Maccaferri. As appears from Saul's credited account, he spoke to Maccaferri the day after the strike began, urging him to put Ciccone back to work. He told him that that was the only issue at the moment, and after that was settled and the men back at work they could then negotiate on others. But Maccaferri, declaring that Ciccone was "no damn good," refused to consider Ciccone's return. Maccaferri also expressed the position that he could not negotiate with Saul in view of the conflicting representation claims. Later, first Tonelli and then Maccaferri communicated with Saul to request that he agree to send the employees back to work and settle the representation controversy by an election after their return. Saul was short with Tonelli, telling him that if an election was to be conducted, it should be conducted

while the employees were still out. In response to Maccaferri's request, Saul stated he wanted Ciccone reinstated first. But Maccaferri declared he wanted to have nothing further to do with Ciccone, nor with some seven or eight other employees prominent in Local 3127 activities whom he named. Saul then refused to consent to an election, in- [fol. 403] dicating as an additional ground for his refusal that he did not want to have Local 318 appear on the ballot. Saul also gave some general testimony that during this period he unsuccessfully sought through various intermediaries to obtain Maccaferri's agreement to submit the issues between them to arbitration. His testimony is vague, however, as to just what steps he took in that direction and as to just what issues he sought to have arbitrated. Saul did not claim, and there is no evidence to show, that Local 22045 ever invoked by the required written notice the arbitration procedures under the contract. The inference is that it did not.

In the early part of December 1950, O'Neill started a back-to-work movement. At a meeting, held at Local 318's office on December 11, 1950, O'Neill, and other nonpicketing employees who had helped promote the meeting, assured invited employees that they could return to work despite their breach of contract. Immediately after the meeting, 16 employees reported in a group to the Respondents for work. They were reinstated to their former positions as old employees without any loss of seniority or other rights and privileges.[37]

On the same day, the Respondents addressed a form letter to other employees, including all those named on Schedule A hereto attached, reading as follows:

> We do hereby advise you that due to your breach of contract with us, which did not expire until November

[37] The General Counsel sought to prove that these employees were promised, and later granted, wage increases in consideration of their abandonment of their activities on behalf of Local 3127. Without detailing the evidence relied on, I think it sufficient to say that this particular contention is not supported by the record as a whole.

[fol. 404] 30, 1950, by going out in strike on November 10, 1950, in violation of the provisions of the contract, we have terminated your employment with this corporation.

Two days later, Local 3127 placed a picket line about the offices of Local 318. Alarmed by this action, Tonelli sent for Saul. Saul told Tonelli that he would not remove the pickets unless Tonelli withdrew his claim of interest in the representation of the Respondents' employees. With Saul listening in on an extension, Tonelli telephoned Maccaferri, told him that he was "loaded with pickets" and in a "mess of trouble," and was being forced to withdraw from the picture. In response to Maccaferri's protest, "I didn't think you were going to do this," Tonelli said he was being forced to, because, as a labor union, Local 318, unlike the Respondents, could not stand being picketed. There was also some conversation in Italian, not understood by Saul, winding up with a statement in English by Tonelli, "No, I am going to call my lawyer and tell him to withdraw."

That same day, Local 318 notified the Board's Regional Office that it was withdrawing all claim to interest in the representation proceeding previously filed by Local 65. About 2 weeks later, Local 65 notified the Regional Office that it, too, desired to withdraw. In the meantime, Local 3127 filed a representation petition of its own in Case No. 2-RC-3170, Local 22045 withdrawing at about the same time the unfair labor practice charges it had previously filed. With Local 318 no longer in the picture, Maccaferri who had previously professed anxiety for an election to compose the representation differences, now declined to consent to one. On December 29, a hearing was held on the representation petition filed by Local 3127, and on January 29, a [fol. 405] Decision and Direction of Election was issued by the Board. The Board ruled, *inter alia*, that since no unfair labor practice charges were then on file with respect to the strike, the voting eligibility period would be the last payroll period immediately preceding the date of the Direction, with all strikers and employees on that payroll presumptively eligible to vote. In doing so, the Board rejected Local 3127's contention that the eligibility period should be that immediately preceding the date of the strike. Three

days before the Board's Decision, however, Local 3127 filed its charge in this proceeding. On being apprised of that fact, the Board, on February 2, 1951, entered a supplemental order in the representation proceeding, postponing the holding of an election until such time as the Regional Director might deem it proper.

Picketing continued until the end of January or the beginning of February, but no application for the reinstatement of striking employees was made until March 9, 1951. The application on that date was an unconditional one, made by registered letter written by Local 3127 on behalf of all employees. On advice of counsel, the Respondents ignored the letter. Before the receipt of the unconditional application the Respondents hired a substantial number of replacements. In addition, they rehired some seven former employees besides those reinstated on December 11, 1950. Although the Respondents have had occasion since March 9, 1951, to hire numerous new employees in classifications for which striking employees were presumptively qualified, none of the strikers named in the complaint, and listed on Schedule A hereto attached, has been reinstated.

[fol. 406] L. *Solicitation of employees to abandon Local 3127 and strike activities.*

To establish the allegations of the complaint relating to the Respondents' illegal solicitation of employees to abandon picketing and other activities on behalf of Local 3127, and also to support other allegations of the complaint, the following additional proof not previously adverted to was offered.

Pieroni testified without contradiction, and it is found, that, shortly, after he received his letter of discharge, he had a conversation with Maccaferri in which Maccaferri invited him to give up Local 3127 and return to work. When Pieroni reminded Maccaferri that he had been discharged, Maccaferri replied in substance that if Pieroni were willing to give up Local 3127 he could forget about the discharge letter and return to work.

Morris Brender testified, also without contradiction, and it is found, that about Christmas, 1950, he and several other pickets met Maccaferri outside the plant and wished him a Merry Christmas. Maccaferri told the employees, "Why

don't you fellows get smart to yourself and come back to work and forget about 3127, and I will give you back your Christmas bonus.[38]

Estelle Sills testified, without denial, and it is found, that about 4 or 5 weeks after picketing began, Maccaferri told [fol. 407] her and several other pickets in front of the plant that he would never sit down with Local 3127, but if they wanted to return to work they could do so, provided they forgot about Local 3127. Sills further testified, and it is found, that about 9 weeks after the picketing began, she accompanied one of the pickets, Lillie Maddalena, to Maccaferri's office for the purpose of correcting a payroll record for unemployment insurance purposes. At that time Maccaferri urged Maddalena to forget about Local 3127 and to return to work.[39]

M. *Concluding findings.*

1. Violation of Section 8 (a) (1) and 8 (a) (2)

The proof of the Respondents' unlawful interference with employee self-organizational rights, and of its illegal

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[38] Another witness, Luis Cartagena, also testifying to this incident, attributed to Maccaferri the further statement that the employees should sign with Local 318 and go back to work. As Local 318 had already withdrawn its claim of interest, I do not think it likely that Maccaferri made any such express references to Local 318 at that time, and do not accept Cartagena's testimony in that respect.

[39] Maddalena also testified concerning this incident. According to her version, Maccaferri in urging her to return to work also told her that if she joined Local 318 she would be well paid. Maccaferri specifically denied mentioning Local 318 to Maddalena. In view of the fact that Local 318 was by this time out of the picture, I credit Maccaferri's denial in that respect. Maddalena also testified that some time after she received the discharge letter, she called Maccaferri to ask whether she could come back to work, and that Maccaferri responded she could "if you join my union and give up this goon's union." For the reasons indicated, I also credit Maccaferri's denial in this respect.

sponsorship, assistance and support of Local 318, is overwhelming. Notwithstanding Maccaferri's assertion that he merely sought Tonelli's advice on how to combat the organization campaign of Local 65, I think it is obvious from the entire sequence of events that the object of his dealings with Tonelli was a much broader one—to have Local 318 substituted in the place and stead of Local 22045 as bargaining agent. Maccaferri's original motive may well have been, as he says, to prevent what he considered a communist-dominated union from taking over the representation [fol. 408] of his employees. But while this may explain, it does not justify the conduct in which he engaged. The Act leaves to employees alone the right to decide what union shall represent them. For an employer to encourage a union to undertake such representation, and to negotiate with it for that purpose in advance of that union's selection by the employees, as the Respondents did here, is for him unlawfully to intrude upon his employees' self-organizational rights.

At the beginning, Maccaferri sought to accomplish his objective by arranging a private deal with the respective business representatives of Local 22045 and Local 318, under which Local 22045 would agree voluntarily, and perhaps for a monetary consideration, to transfer its representation interests to Local 318. This inference is inescapable from a cumulative consideration of all the surrounding circumstances—Maccaferri's meeting with Tonelli; his insistence after that meeting that Saul confer with Tonelli; his accompanying declaration to Saul that Tonelli would have to approve any new contract negotiated with Local 22045; the proposals made by Tonelli to Saul at their meeting; and the meeting at Mr. Kahn's office, at which the Respondents' representatives, revealing their complete familiarity and approval of Tonelli's negotiations with Saul, sought to induce Saul to withdraw in favor of Local 318. The Respondents' abortive efforts in that regard, designed as they were to circumvent their employees' own choice of a bargaining agent, constituted, it is found, an illegal interference with employer right guaranteed by the Act. It is no answer to say that Saul, for a time at least, appears to have been receptive to a sale to Local 318 of his union's repre-

[fol. 409] sentation interests. Representation authority is conferred upon an agent by majority designation of the affected employees, and is subject to change or withdrawal only by the employees themselves. It is not an object for bargain and sales. And it was not for the Respondents to seek to tempt or influence their employees' bargaining agent on a matter of this kind.

When Maccaferri finally became convinced that Local 22045's voluntary withdrawal in favor of Local 318 could not be arranged, he decided to take matters in his own hands to insure the employees acceptance of the union he chose for them. Accordingly, ignoring the employees' statutory rights to organize without interference from their employer, he set out to sponsor, assist and support an organizational campaign for Local 318. He set the stage for that campaign by prompting O'Neill to visit Local 318's offices along with other employees to confer with Tonelli and to obtain campaign material and application cards.[40] He encouraged the employees in the O'Neill group to proceed with the campaign, and also directly solicited others to participate in it, among them Squillate, Ciccone, and Pieroni, implementing his solicitation by express and implied promises of benefit and threats of reprisal.[41] He sat down with [fol. 410] the O'Neill group to help plan the mechanics of the campaign to be conducted the following Monday. And

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[40] Despite O'Neill's and Maccaferri's insistence at the hearing that the visit was O'Neill's idea, I am persuaded on this basis of the entire record that O'Neill, as she informed the other employees at the time, was actually requested by Maccaferri to call on Tonelli.

[41] E.g., his observation to the O'Neill group that he would give everything to Local 318 but nothing to Local 22045; his statement to the same group that if employees did not sign they knew where the door was and they could get out; his similar statement to Pieroni; his declaration to Ciccone indicating employees would benefit from Local 318 but that he would close his doors before dealing with Local 65 or Local 22045; and his intimations to Amorosa and Ciccone that they might individually expect to benefit by assisting in the campaign.

to show unmistakably that he considered employees participating in the Local 318 campaign to be acting in the Respondents' interests, and his willingness to reward them for it, he agreed to, and did, compensate the members of the O'Neill group at overtime rates for a full day, because they devoted part of the day to organizational efforts for Local 318, although none to production work.

With the stage thus set, the Respondents' management and supervisory officials went the whole route to support and assist the intensive Local 318 organizational drive which was conducted in the plant on October 23. In sharp contrast to the attitude later displayed toward Ciccone when he was suspected of organizing for Local 3127, Local 318 solicitors were allowed unrestricted freedom in the use of company time and property. One foreman, Ritacco, personally participated in the distribution of Local 318 application cards. Others, refrained from such direct participation, but, no less unlawfully, contributed support to the campaign by openly announcing the Respondents' approval of that union, by making no effort to conceal their anxiety to have it installed as bargaining representative, by indicating that employees might expect to benefit from that choice through a more satisfactory contract, and—in the case of Mrs. Maccaferri—by declaring that employees would be unable to work in the plant unless they joined Local 318. In short, the Respondents' representatives utilized their full economic power to see to it that a majority of their employees signed for Local 318 that morning. The rapidity with which the majority was attained attests to the force of that power.

[fol. 411] For a period of slightly more than 2 weeks after October 23, there was an abatement of the Respondents' illegal activities, but not a complete abandonment of it. Continued support of Local 318 is reflected by the Respondents' release of employees Cartegena and Pellay at O'Neill's request to attend a Local 318 meeting and the payment made them for the time they were gone. It is reflected as well by Zwoboda's coercive remark to employee Sills, upon learning she had renounced her designation of Local 318, that she was foolish not to stick with Local 318 as it might cost her her job. At the meeting at Attorney Kahn's office

on November 8, Maccaferri revealed, or at least professed, a disposition to withdraw his support of Local 318 and to compose his differences with Saul. What motivated that sudden—and as events proved, temporary—change in attitude, if change in attitude it was, is not apparent from the record and must remain a matter of speculation. Perhaps it was because of the unfair labor practice charges that had been filed, tieing up the chances of Local 318 gaining quick control at an election. Perhaps it was because Maccaferri feared the deterioration of employee morale and the possibility of a strike by Saul's union, which, as events after October 23 proved, was still able to retain some hold on the loyalty of employees. Perhaps, as the General Counsel believes, it was only because Maccaferri wanted to lull Saul into a false sense of security. In any event, I am persuaded that, whatever the reason, some time between November 8 and November 10, Maccaferri reverted to his original position and became as determined as ever to use every means to maintain employee adherence to Local 318.

Maccaferri's renewed determination in that regard was made apparent on the morning of November 10, when, con- [fol. 412] fining Ciccone to the machine shop, he violently reprimanded him for attempting to disturb the employees' acceptance of Local 318 by signing them up for Local 3127, Saul's other union to which the Local 22045 membership had voted to transfer. It was brought into even sharper focus that afternoon by Ciccone's discharge—found below to be discriminatory—and by the events which followed. Various supervisors seized the occasion to foster the impression already current in the plant that the discharge represented reprisal action for Ciccone's union activities on behalf of Local 3127, and that others might expect like treatment if they went along with Local 3127 instead of adhering to Local 318. In talks to employees in their departments, Supervisors Zwoboda and Mrs. Maccaferri expressed Maccaferri's determination to see Local 318 installed as bargaining agent, pointing to the economic risks of opposing his will. Maccaferri himself in an address to the second shift molding room employees, not only voiced his approval of Local 318 and bitter antagonism toward Local 3127, but made it clear that Local 318 alone of the

competing unions was the one he would deal with and grant benefits to, indicating he would close his plant rather than have anything to do with the others.

During the course of the strike, Maccaferri in conversations with employees sought to impress upon them that they could come back to work only if they abandoned membership in Local 3127. On a number of occasions, Maccaferri individually solicited strikers to abandon their picketing activities, and on one occasion promised as an inducement to pay them a Christmas bonus if they did.

[fol. 413] On the basis of the facts summarized above, I find substantial support in the record for the allegations of the complaint that the Respondents, in violation of Section 8 (a) (1), interfered with, restrained, and coerced their employees in the exercise of their rights guaranteed by Section 7 of the Act, by (a) inducing and encouraging the representatives of Local 22045 to agree to substitute Local 318 in its place and stead; (b) inducing and encouraging the representatives of Local 318 to engage in a campaign to displace Local 22045 as the bargaining agent of their employees; (c) sponsoring, supporting and assisting the organizational campaign of Local 318; (d) giving financial rewards to employees active in the organizational campaign of Local 318; (e) inducing employees by threats, warnings of reprisal, and promises of benefits to become and remain members of Local 318 and to refrain from becoming or remaining members of other competing unions; (f) making abandonment of membership in or activities on behalf of Local 3217 a condition of continued or new employment, after the start of the strike; and (g) soliciting employees engaged in picketing and other strike activities on behalf of Local 3217 to abandon such activities, and promising benefits to induce them to do so.

I further find that by such conduct—to the extent it occurred before December 13, 1950, the date Local 318 withdrew its representation claim—as well as by the discharges hereinafter independently found to be in violation of Section 8 (a) (1) and (3) of the complaint, the Respondents rendered unlawful assistance and support to Local 318, and did thereby violate Section 8 (a) (3) of the Act.

[fol. 414] The complaint contains certain additional alle-

gations of conduct claimed to be violative of Section 8 (a) (1) and (2) that I find not to be sustained. Thus, it is alleged the Respondents unlawfully reinstated without loss of seniority or other rights and privileges those who did engage in activities on behalf of Local 3127, while requiring employees who did so engage to apply for new employment. The fact that the employees who returned to work as part of the Local 318 back-to-work movement were fully reinstated without loss of rights was not illegal in itself. There is no substantial proof to show on what basis the Respondents later rehired other workers. The Respondents, it is true, thereafter rejected Local 3127's unconditional application for the reinstatement of all strikers. But if this was illegal it was because the strikers as unfair labor practice strikers were entitled to reinstatement in law, and not because of the dissimilarity in the treatment accorded those who had earlier returned. It is also alleged that the Respondents illegally granted wage increases to those employees who abandoned the strike on or about December 11. While it appears that most of the 18 employees who returned to work on December 11, 1950, were given small hourly wage increases in varying amounts some weeks after their return, there is no evidence to show that these increases were promised to induce their return, or that the wage increases were given for an illegal purpose.

2. The discriminatory discharge of Frank Ciccone

The relevant facts have been reported above. The complaint alleges the Respondents discriminated against Ciccone because of his union activities. The Respondents [fol. 415] assert Ciccone was validly discharged for disobeying a special instruction of Maccaferri to remain at his work station in the machine shop. On all the evidence, I am satisfied the complaint must be sustained.

I think it clear, to begin with, that Maccaferri's instruction confining Ciccone to the machine shop was motivated by discriminatory considerations. The facts found show conclusively that Maccaferri issued the special instruction, not only because he suspected or believed Ciccone to be engaged in solicitation activities on behalf of Local 3127,

but more importantly to him, because he was resentful of Ciccone's efforts to wean employees away from Local 318. In the particular circumstances of this case, it matters not that Maccaferri may have honestly believed, although the record here shows no proper basis for such a belief, that Ciccone had been using company time for that purpose. An employer may, of course, prohibit and take appropriate steps to prevent union activities on company time, or, once having permitted it, later to forbid it; but if he would do so, he must do so, impartially; and he may not single out one individual or union group for restriction while allowing full liberty to another. Here, the Respondents had no rule of general application against union activities on company time and property. Indeed, Local 318 adherents recently not only had been permitted, they had been encouraged, to utilize company time for the advocacy of that union's cause. Company time was also used on the afternoon of Ciccone's discharge support the interests of Local 318 in opposition to Local 3127. On this record, the Respondents are scarcely in a position to assert that the special instruction was justified in the interests of maintaining plant production. The transparent inspiration for [fol. 416] the instruction was not that Ciccone was using company time to engage in union activities as such, but that he was believed to be using it for the purpose of assisting a particular union to which the Respondents were opposed.

The special instruction issued Ciccone was t'. s analogous to a no-solicitation order that is not exte (d to all as a rule of general application, but is applied to single individual or a limited group. If construed as prohibiting Ciccone from leaving the rest room at *any* time, it was also —considering its motivation— discriminatory under the Act for another reason. For, thus construed, it imposed upon Ciccone because of his union activities a special working condition, namely, the requirement to remain in the machine shop even during the contract authorized rest period, when other employees were granted the privilege of leaving and otherwise utilizing the period as free time. Inasmuch as the instruction, in the respects noted, was discriminatory and hence illegal, it follows that if Ciccone, by leaving the machine shop during his rest period, had in

fact violated the instruction, his discharge for that reason would have been illegal under Section 8 (a) (3). See *Republic Aviation Corporation v. N. L. R. B.*, 324 U. S. 793, 805.

But decision here need not rest on that ground. For it is clear on the record that Ciccone did not in point of fact disobey the instruction Maccaferri had given him. Maccaferri himself expressly admitted while testifying that his instruction to Ciccone was not so restrictive as to mean Ciccone could not leave the machine shop for such usual purposes as going to the rest room or for a Coca Cola. There is no claim that Ciccone actually engaged in any union activities, and no credible evidence that he [fol. 417] engaged in any untoward conduct, when he went for a Coca Cola on the particular occasion here involved. Indeed, what he did then was no different from what other machine shop employees did at the same time. And, as Maccaferri and Zevin conceded at the hearing, what the others did was not considered a dischargeable offense. The haste with which Mrs. Maccaferri telephoned her husband, and the haste with which her husband acted to order Ciccone's discharge, neither of them troubling to investigate Ciccone's actual reason for leaving the machine shop, point inescapably to the conclusion that Maccaferri, if he did not actually anticipate when he gave Ciccone the instruction that this particular situation would arise, was at least anxiously looking for some pretext upon which to frame Ciccone's discharge. Even if Maccaferri honestly, although mistakenly, believed at the time that Ciccone was about to engage in union activities, this would not aid the Respondents' position in the light of all the circumstances indicated above. On all the evidence I am fully satisfied that Maccaferri's real reason for discharging Ciccone was not what the Respondents now claim it to be. I find, rather, that it was rooted in the same discriminatory considerations that had led him earlier that morning to order Ciccone's confinement to the machine shop.

It is found that the Respondents by discharging Frank Ciccone on November 10, 1950, and thereafter refusing to reinstate him to his former position, discriminated with regard to his hire and tenure of employment, thereby dis-

couraging membership in Local 3127, encouraging membership in Local 318, and interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act.

[fol. 418] 3. The alleged discriminatory lockout and constructive discharge of other employees on November 10, 1950.

The General Counsel would support this allegation of the complaint on the following basis: Factually, he contends that on November 10, 1950, immediately following Ciccone's discharge, the Respondent imposed upon their employees, as a condition of their continued employment, the requirement that they give up Local 3127 and accept Local 318 as their bargaining agent. Rather than accept the discriminatory condition of employment thus imposed, and for that reason—he says—the employees ceased their work. Legally, the General Counsel relies on a line of Board cases holding in substance that employees need not acquiesce in a condition of employment unlawfully requiring them to abandon the union of their own choice or to accept a union of their employer's selection, and that a refusal by employees to continue with their work under such circumstances constitutes neither a quitting of their employment nor a strike, but, rather, a discriminatory constructive discharge or lockout.[42]

The difficulty with the General Counsel's theory is that it is predicated upon an assumption of facts the record does not support. There is evidence, to be sure, that following Ciccone's discharge, a number of the Respondents' supervisory and management officials made statements that employees were reasonably justified in construing as promising them benefits if they adhered to the [fol. 419] union of Maccaferri's choice, and threatening reprisal if they did not. It is doubtful, however, whether

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[42] The General Counsel's brief cites: *Louis F. Casoff*, 43 NLRB 1193; *Watkins & Company*, 53 NLRB 235; *McLeansboro Shale Products Co.*, 69 NLRB 809; *Quest-Shon Mark Brassiere Co.*, 80 NLRB 1149; *Hamilton-Scheu Co.*, 80 NLRB 496.

these coercive statements may fairly be read, or were understood by the employees, as imposing as an already consummated and effective condition of employment the discriminatory requirement claimed by the General Counsel. The line between a threat to discriminate against an employee in the future—which would not alone justify the employee in considering himself discharged[43]—and the actual imposition of discriminatory conditions of employment—to which an employee need not accede—is not always a clear one. Where it lies can only be determined on a case-to-case basis upon consideration of all surrounding circumstances. On the particular facts found in this case, I am not persuaded that a holding is justified that the line was crossed.

But the weakness of the General Counsel's factual premise lies even deeper. To sustain the General Counsel's position, it is not enough to show that discriminatory conditions actually were imposed. It is necessary also to show that the employees claimed to have been discharged actually ceased their work for that reason. As appears from the findings made above, those employees who were the first to walk out decided to do so *before* the utterance of the coercive statements on which the General Counsel would predicate a finding of discriminatory lockout or constructive discharge. Of those who remained in the plant and who heard the coercive statements before they decided to join the walkout, only one testified he left because he believed he would no longer be permitted to work there, and his testimony has been discredited. The others [fol. 420] who declared themselves on that point testified that they walked out, or failed to return the next day, either because they wanted to protest the discriminatory discharge of Ciccone, or because they respected the picket line which was set up. It does not appear that any of them actually considered himself discharged until receiving the discharge notification some weeks later.

For the reasons indicated, I conclude and find that the employees named in the complaint (other than Ciccone) were not discharged or locked out on November 10, 1950. I find, rather that they went out on strike.

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[43] Trenton Garment Co., 4 NLRB 1186.

4. The strike as an unfair labor practice strike

On all the evidence, I am convinced, and I find, that the strike which began on November 10, 1950, and extended until the unconditional application for reinstatement was made on March 9, 1951, resulted from the cumulative effect upon the employees of the Respondents' unfair labor practices, climaxed by Ciccone's discriminatory discharge, and was caused by such unfair labor practices. I further find that the strike, after it began, was prolonged by the Respondents' continuing unfair labor practices.

4. The discriminatory discharge of striking employees on December 11, 1950, and the discriminatory refusal to reinstate them upon their unconditional application for reinstatement on March 9, 1951

a. *The issues*

The basic question to be decided is whether the strikers were engaged in protected concerted activities. The Re- [fol. 421] spondents assert they were not, for two reasons: First, they contend, the strike was violative of the "no-strike" provision, contained in the collective bargaining agreement with Local 22045 which was still in effect when the strike began. Because of that, they say, the Respondents were privileged to discharge the strikers for breach of contract. Secondly, they contend, the strikers lost their status as employees of the Respondents under Section 8 (d) of the Act, by engaging in a strike within the 60-day period following service by their collective bargaining representative upon the Respondents of a proposed termination or modification of the existing collective bargaining contract. Joining issue with the Respondents on these contentions, the General Counsel asserts that neither of the defenses relied upon are available to the Respondents because the strike was caused and provoked by serious employer unfair labor practices.

If the Respondents are right, and the General Counsel wrong, on either or both of these issues, the allegations of illegal discrimination against the strikers would have

to be dismissed. It would not matter that the record here shows that the Respondents reinstated some strikers and not others, and that after the unconditional application for reinstatement the Respondents hired many new employees in positions for which strikers were qualified. A finding, under the Respondents' first defense, that the strike activity was unprotected, would mean that the discharges were lawful and that the Respondents were free thereafter to exercise any choice they saw fit with respect to reemployment of the dischargees. *United Elastic Corp.*, 84 NLRB 768. A finding supporting the Respondents' second defense would achieve a similar result, for Section [fol. 422] 8 (d) (4) permits an employer to restore employee status on an individual basis to any employee whose status has been lost under that section.

If, on the other hand, the General Counsel is upheld on these issues, it would follow that the allegations of the complaint, both with regard to the discriminatory discharges and the discriminatory refusals to reinstate, must be sustained. In that event, regardless of any replacements that may have occurred during or since the strike, effectuation of the policies of the Act would require as a remedial measure the reinstatement of the strikers named in the complaint as well as the reimbursement to them of any losses in earnings sustained as a result of the discrimination. Back pay, however, would be dated from the date of the application for reinstatement, not from the date of discharge. At the time of the discharge the employees were on strike, and there is nothing in the record to support a finding that, but for discharge, the strikers would have abandoned the strike and returned to work before the date of their unconditional application—unless of course, the Respondents remedied the conditions against which they were striking. Any loss of earnings they may have suffered prior to that time cannot therefore be said to have been caused by the Respondents' discrimination. See *American Manufacturing Company of Texas*, 98 NLRB No. 48.

With these other matters out of the way, we turn now to a specific consideration of the affirmative defenses urged by the Respondents.

[fol. 423] (b) *The breach of contract defense*

While not contesting the general validity of the *Sculin-Dyson* doctrine,[44] the General Counsel asserts that it should not be applied to a situation where, as here, the strike is provoked by an employer's serious unfair labor practices. The General Counsel makes two principal points. The first is that such a dispute was not within the contemplation of the contracting parties when they entered their "no-strike, no-lockout" agreement, and therefore cannot be said to be in breach of contract. The second is that the employees were excused from the performance of the no-strike clause, even if it could be construed to apply to such a dispute, because of the Respondents' prior breach of the contract. I am persuaded that there is substantial merit to the Respondents' first point. I think, too, although not precisely for the reasons advanced by the General Counsel, that, in view of the character of the unfair labor practices which caused the strike, it would neither effectuate the policies of the Act nor conform to general equitable principles to permit the Respondents to invoke the contract clause to deny the strikers the protection to which the Act would otherwise entitle them. I reach these conclusions for the reasons stated below.

Section 7 of the Act guarantees to employees the right to engage in concerted activities for their mutual aid and protection, and Section 13 expressly preserves to them the right to strike, except as otherwise specifically limited by the Act—the situation before us not falling within the specified limitations. It is, of course, now well settled by [fol. 424] decisional law that the right to strike may be bargained away for the term of a contract. But since a contractual waiver is in derogation of normal employee rights, it is to be strictly construed to apply only to situations that may reasonably be concluded to have been within the contemplation of the contracting parties when the agreement was made. In the instant case, it is true, the no-strike clause

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[44] *Sculin Steel Company*, 65 NLRB 1294; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445. See also *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U. S. 332.

itself contains no express qualification. But, like other clauses in the contract, it may not fairly be read in isolation. When read, as it must be, as an integrated part of the entire contract, it appears reasonably clear that the *quid pro quo* for the no-strike clause was not only the no-lockout clause, but, more important, the clause of the contract headed "Disputes," under which the parties agreed to arbitrate differences that might arise between the employers, the Union or its members. The express language of that clause reveals the character of the "differences" the parties contemplated might arise, and for which the peaceful procedures of arbitration were to be substituted for trial by combat. They are stated as "differences * * * as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretation, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." In short, it appears in context that what the parties had in mind when they mutually agreed to arbitrate their disputes, and to forego strikes and lockouts over them, were situations that might normally arise under the administration of the contract. I do not think the contract is fairly to be read as indicating an intention by either party to waive the usual right of self-help to correct abuses, unrelated to the actual operation of the contract or the [fol. 425] normal relationship of the parties, but arising, as in this case, from a wilful and serious violation of law designed to destroy the very foundation of that contract and that relationship. The thought I am seeking to convey was better and more succinctly expressed by Chairman Herzog in his concurring opinion in *National Electric Products Corporation*, 80 NLRB 995, as follows:

> But such clauses ordinarily contemplate a pledge by one party not to strike or lock-out during the term of a contract because of any conduct by the other party relating to its provisions or to their normal relations. In the absence of an express provision to that effect, I do not see how such a clause can also be taken to disclose an intention by either party to include a pledge never to use self-selp in the event of a serious violation of law by the other. If a contract

does not preclude self-help in such circumstances, its use cannot constitute a breach of that contract. And if there is no breach, this Board may not apply the *Scullin-Dyson* rule.

Whether, as a strict matter of contract law, the Respondents can be said to have engaged in a prior breach of contract, so as to excuse performance of the no-strike clause—as the General Counsel alternatively argues—is open to some doubt. The General Counsel would premise a finding of a prior breach upon the Respondents' course of conduct, illegal under the Act, by which they sought to substitute the company-sponsored union, Local 318, in the place and stead of Local 22045, the existing bargaining agent to which they were then bound by contract. By such conduct, the General Counsel says, the Respondents did violence to their contractural obligation to recognize and [fol. 426] deal only with Local 22045. As a matter of strict contract law, the weakness in this approach lies in the fact that no complaint is made in this case, although there may be some evidence to that effect, that the Respondents actually refused to bargain with Local 22045 on any bargainable matter during the contract term. Nor does it appear that the Respondents committed an anticipatory breach by aiming to supersede the bargaining agent during, rather than at the end of, the contract term. In view of these circumstances, the General Counsel's argument, that the Respondents violated their contractural obligation to bargain and deal with Local 22045 appears to me to be strained. There would seem to be far more substance to his added argument that where an employer and a union enter into a collective bargaining contract, otherwise silent on that subject, each impliedly agrees not to engage in any illegal practices violative of the rights of the other or of the employees under the Act, so that if either commits an unfair labor practice, it is a violation not only of the law but of the contract as well.[45]

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[45] Cf *Armour Packing Co* v. *United States*, 209 U. S. 56, 62, where the Court, holding certain provisions of the Interstate Commerce Act to be by implication of law part of an

But in determining whether the Respondents' illegal course of conduct that provoked the strike excused the employees from their "no-strike"-contract commitment, I think it unnecessary, and indeed wrong, to rest decision on strict principles of contract law. The law of labor relations is *sui generis*, and is not to be shaped by wood-fol. 427) enly assimilating to it principles of common law evolved to govern other fields and to regulate other relationships. Of course, the Board may not effectuate the policies of the Act with such myopic vision as wholly to blind itself to conflicting principles or objectives of equal or greater importance arising from the application of other laws. But that does not mean that in all cases where rights granted in the Act come into competition with legal rights otherwise conferred, those of the Act must give way. Where such conflicts arise, the competing interests must be accommodated one to the other, if possible, and if that is not possible, then the judgment of which shall prevail must be made by balancing equities and according recognition to that interest which in the circumstances of the case will best effectuate public policy. An equitable principle frequently given decisive weight, although not perhaps expressed as such, is that of the "clean hands" doctrine. He who would claim an impairment of another's normal legal right must not himself be wilfully guilty of illegal or improper conduct inducing the situation that is claimed to have brought about the impairment. This approach has often been followed by the Courts and the Board, and, indeed, lies at the heart of the *Scullin-Dyson* doctrine itself. An illustration that readily comes to mind is *Frank Bros. Company v. N. L. R. B.*, 321 U. S. 702, 704, where the Supreme Court upheld the principle that an employer should not be permitted to profit by his own wrong, by pleading as a bar to a bargaining order, a loss

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agreement executed under the authority of that statute, stated:

> The statute being within the constitutional power of Congress, and being in full force when the contract was made, it is read into the contract and becomes a part of it.

of the union's majority which resulted from his own illegal acts. Another, is *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, where the Supreme Court, while holding that an employer in a strike situation has "the [fol. 428] right to protect and continue his business by supplying places left by strikers" and "is not bound to discharge those hired to fill their place upon the election of the latter to resume their employment," at the same time made clear that the right of replacement applies only to an employer himself "guilty of no act denounced by the statute." On the other side of the coin, the Court and the Board in a variety of familiar situations have held that employees who in their strike activities employ methods or seek objectives that are illegal or otherwise indefensible as a matter of public policy may not raise their rights under the Act as a shield against an employer's normal right to discharge employees for misconduct.[46]

Unless an employer's technical contract rights are to be exalted over employees' statutory rights in all situations and without regard to the respective equities involved, the same balancing of equitable considerations would seem applicable in a situation such as appears in the instant case. Surely, an employer, who, like the Respondents here, by his own wilful, deliberate, wide-spread and grave unfair labor practices, has caused his employees to protest in a traditional way his disposition to violate the law, should not be allowed to assert that his employees forfeited their normal rights to statutory protection, because of an alleged [fol. 429] contract violation flowing from the very strike

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[46] See, e.g., *N.L.R.B.* v. *Fansteel Corp.*, 306 U. S. 240 (illegal plant seizure); *Southern Steamship Co.* v. *N.L.R.B.*, 306 U. S. 31 (mutiny); *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U. S. 332 (breach of contract, not involving unfair labor practices by employer); *International Union U.A.W.* v. *Wisconsin E. R. B.*, 336 U. S. 245 (intermittant work stoppages); *N.L.R.B.* v. *Montgomery Ward*, 157 F. 2d 486 (partial strike while remaining on plant premises and drawing pay); *Thompson Products, Inc.*, 72 NLRB 886 (unlawful objective); *Elk Lumber Co.*, 91 NLRB 333 (slowdown); *N.L.R.B.* v. *Kelco Corp.*, 178 F. 2d 578 (serious acts of violence.)

for which he was responsible. To hold that such employer misconduct does not excuse employee performance of a "no-strike" clause would be offensive both to the spirit of the Act and to one's sense of right. More than that, it would—in the words of Chairman Herzog in his concurring opinion in the *National Electric Products* case—be "likely to encourage the commission of [employer] unfair labor practices of such provocative magnitude that, human nature and the Board's delays being what they are, employees can reasonably be expected—or intended—by their employer to turn to what may prove to be suicidal self-help."

The majority holding in the *National Electric Products* case need not, and does not in my view, constitute controlling authority at variance with the positions being taken here. In that case the unfair labor practice that caused the strike was confined to a single discharge, which was specifically required by the contract, though it was discriminatory under the Board's *Rutland Court* precedents as they were then applied.[47] In that case, there was a complete absence of employer *mala fides*. There the employer, without any wilful and deliberate design itself to defeat employee rights under the Act, acted simply as the instrument of the will of the established collective bargaining agent which had insisted upon the discharge as performance of the employer's contractual obligation. On the particular facts of that case, a majority of the Board as it was then constituted did not believe it would effectuate the purposes of the Act

> [fol. 430] to regard *this employer's unfair labor practice* as sufficient justification for overriding the salutary objective of a "no-strike" clause,

and concluded that

> *under the circumstances here present*, the purposes of the Act can best be effected by requiring employees

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[47] *Rutland Court Owners*, 44 NLRB 587, 46 NLRB 1040. *The Rutland Court* doctrine was subsequently overruled by the Supreme Court in *Colgate-Palmolive-Peet Co.*, v. *N.L.R.B.*, 338 U. S. 355.

to honor their "no-strike" commitments and rely on the remedial purposes of the Board (emphasis supplied).

The factual situation in the cited case was thus entirely different from the one now before the Board. The discharge there was one specifically required by the contract, though then forbidden under the Board's interpretation of the law, and one, therefore, that might reasonably be said to have fallen within the contemplated scope of the "no-strike" clause. Moreover, the isolated, technical and in a sense, innocent, unfair labor practice committed by the employer in that case is scarcely to be compared to the widespread and wilful unfair labor practices engaged in by the Respondents here—unfair labor practices of such grave and provocative magnitude as might well be anticipated to force employees to resort to self-help measures to defend before it was too late their self-organizational rights. Thus, although the Board in the *National Electric Products* case was able to conclude, upon a balancing of conflicting considerations, that the employer's unfair labor practices in that case did not justify the employees in denouncing the contractual "no-strike" clause, I think the scales here tip the other way. In view of the limiting language quoted above, I do not read National Electric Products as establishing a general principle of unrestricted application that no matter what the character of the unfair labor practices may be, and no [Vol. 431] matter what the parties may have contemplated when they agreed to a "no-strike" clause, employees who in the face of such a clause engage in self-help to protest unfair labor practices are to be denied the nomal rights of strikers under the Act. It is no answer to say that even where, as here, the unfair labor practices are of a serious and provocative character, the employees still have open to them the avenue of the Board's remedial processes. That is true even in the absence of a "no-strike" clause; yet no one questions the principle, firmly imbedded in the law, that employees who in such a situation turn to self-help to protest unfair labor practices are entitled not only to immunity from discharge but to protection against replacement. To require employees in a situation such

as appears in the instant case, where time is of the essence, to forego self-help in favor of the time consuming remedial processes of the Board, or, if they would engage in self-help, to risk discharge, is to invite them to court disaster whichever way they turn.

Nor do I consider it a defense in this case, that the contracting union did not formally invoke the contract's arbitration procedure to review Ciccone's discharge. As has been found, the discharge was merely the climactic aspect of the Respondents' illegal course of conduct. And as an unfair labor practice, it was outside the scope of the arbitration provision, not only because it did not involve a difference as to the meaning, interpretation, operation or application of any clause of the contract, or any breach thereof, but because as a matter of law the forum for unfair labor practice adjudication is not contract arbitration but the Board.[48]

[fol. 432] For the reasons indicated, I find no merit to the Respondents' alleged breach of contract defense.

(c) *The Section 8 (d) defense.*

The collective bargaining contract which was in force on November 10, 1950, when the strike began, carried a November 30, 1950, expiration date. Although there had been some prior discussions between the parties concerning a new contract, Local 22045 did not serve a written notice of its intention to terminate or modify the then existing contract until September 29, 1950. Under the provisions of Section 8 (d) (4) the parties were thus required to "continue in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existng contract for a period of sixty days after such notice * * *" As the same subsection elsewhere provides that

> Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute * * *

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[48] See *Monsanto Chemical Company*, 97 NLRB No. 77, and cases there cited.

it would have clearly followed, if the strike's purpose had been to compel a change in the then existing contractural terms and conditions, that the employees engaging in it forfeited their status as employees, and with it their right to claim illegal discrimination on the basis of the Respondents' action in discharging and later refusing to reinstate them.

But, as found above, the purpose of the strike was to protest and seek to remedy the Respondents' unfair labor practices. The record does not support a finding that the strike also had as an additional objective the termination [fol. 433] or modification of the existing contract. It is true that demands for contract changes had previously been presented to the Respondents, and there had been some discussion at meetings of Local 22045 or Local 3127 of a possible strike if such demands were not met. But no strike vote on that issue had ever been taken, nor was any strike action otherwise determined upon. On the record as a whole, I am fully satisfied, and I find, that the strike which immediately followed Ciccone's discharge was unplanned and began as a spontaneous demonstration by employees of their protest of the Respondents' unfair labor practices. Nor does the record reflect that its character changed after it began to one where the strikers were seeking to compel changes or modifications in economic terms or conditions of employment. There is no evidence that any negotiations were conducted, or overtures made, along such lines at any time after the commencement of the strike. The Respondents at the hearing made no such claim, and offered no evidence to establish that the strike had any purpose other than, or in addition, to that claimed by the General Counsel. The principle of law is applicable here, that where the record supports a finding that an employer's illegal conduct under the Act has led to a strike and is at least one of the causes of that strike, the employer, if he would avoid the legal implications flowing therefrom, has the burden of showing that the strike would have taken place even if the unfair labor practices had not been committed. *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2); *N. L. R. B.* v. *Barrett Company*, 135 F. 2d 959, 961-962 (C. A. 7). This the Respondents have not done.

The question to be decided, then, is whether unfair labor practice strikers lose their status as employees because [fol. 434] their strike happens to occur during the 60-day period specified in Section 8 (d) (4).

That question can be answered in the affirmative only by extracting the last sentence of Section 8(d) from its context and giving it a rigid, literal construction. But that is not how statutes are to be read. In determining the legislative intent, the particular inquiry must be directed not to the abstract force of the words, but to the sense in which they were intended to be used in the Act. Consideration must be given to the ends Congress sought to achieve by the particular provision. *Norwegien Nitrogen Products* v. *United States*, 288 U. S. 294. "There is need to keep in view also the structure of the statute, and the relation, physical and logical between its several parts". *Duparquet v. Evans*, 297 U. S. 216, 218. The rule should be followed, that a statute should not be extended beyond the purpose intended. *United States v. McElvain*, 272 U. S. 633. And that is particularly true where, as here, a statutory forfeiture is involved. *United States v. One 1936 Model Ford*, 307 U. S. 219.

From a reading of Section 8(d) as a whole, it is apparent that Congress intended the employee status forfeiture provision appearing in the last sentence to implement and carry out the purposes of the earlier provisions of that section. As for the broad purposes of that section, the Board in *United Packinghouse Workers (Wilson & Co.)*, 89 N. L. R. B. 310, at p. 316, had the following to say:

> It is apparent that the prime purpose of Section 8 (d) was to prevent so-called "quickie" strikes *designed to secure termination or modification of collective agreements.* To accomplish this purpose, Congress in Sec- [fol. 435] tion 2 (d) provided for a mandatory 60-day "cooling off" period during which a labor organization that is a party to a collective bargaining agreement is forbidden to strike to *enforce its demands to modify or terminate the contract* (emphasis supplied).

The last sentence of Section 8 (d), read in "relation, physical and logical" to the balance of the section can only be

interpreted as designed to provide an additional sanction to enforce the broad purposes of the section, by insuring against its circumvention through unauthorized strikes conducted during the "cooling off" period to compel changes in the contract *status quo*. Nothing in the language of the section suggests that Congress intended to do more than to delay for the 60-day period economic strikes arising from bargaining differences that might better be settled about the conference table. Nothing in it suggests that Congress intended Section 8 (d) to reach out to condemn an unfair labor practice strike, otherwise legal, simply because it occurs at the end rather than at the beginning of a contract term, and especially so where, as here, the strike is wholly unconnected with demands to modify or terminate the contract. Indeed, any such interpretation would stretch the scope of the statute beyond what clearly appears to be its restricted purpose—to insure peaceful and uninterrupted negotiations on contract issues for a period of at least 60 days before resort is had to economic warfare. To apply the forfeiture provision to employees engaged in an unfair labor practice strike unrelated to the negotiations, would be to extend that provision beyond its intended purposes, at variance with both the letter and spirit of Section 8 (d) when read as a whole.

For the reasons indicated I find the Respondents' Section 8 (d) defense to be without merit.

[fol. 436] (d) *Finding of discrimination*

It is concluded and found on the record as a whole that by discharging the employees listed in Schedule A on December 11, 1950, the Respondents discriminated with regard to their hire and tenure of employment, thereby discouraging membership in Local 3127, encouraging membership in Local 318, and interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act. It is further found that the Respondents also violated Section 8 (a) (1) and 8 (a) (3) of the Act, by refusing to reinstate said employees following the unconditional application made on their behalf on March 9, 1951.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in Section III above, occurring in connection with the Respondents' operations described in Section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondents have engaged in unfair labor practices in violation of Section 8 (a) (1), (2), and (3) of the Act, it will be recommended that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[fol. 437] Having found that the Respondents discriminated in regard to the hire and tenure of employment of Frank Ciccone, by discharging him on November 10, 1950, and thereafter refusing to reinstate him, and having further found that the Respondents discriminated with regard to the hire and tenure of employment of the employees listed on Schedule A, hereto attached, by discharging them on December 11, 1950, and refusing to reinstate them on and after March 9, 1951, following their participation in a strike caused and prolonged by the Respondents' unfair labor practices, it will be recommended that the Respondents be ordered to offer Frank Ciccone and the employees listed in Schedule A full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. If there are not sufficient positions available in appropriate job classifications, the Respondents shall make room for the employees ordered reinstated by dismissing to the extent necessary employees occupying such classifications who were hired after November 10, 1950. If after such dismissal there are still not sufficient positions available, all existing positions in the appropriate job classification shall be distributed among the employees ordered reinstated and other employees who were hired on or before Novem-

ber 10, 1950, without discrimination against any of them because of his union affiliation or strike or concerted activities, following such system of seniority or other nondiscriminatory practices as would normally have been applied by the Respondents to determine job retention rights upon a reduction of force. All employees remaining after such distribution, including those ordered reinstated, for whom no employment is immediately available, shall be placed upon a preferential list and offered reemployment as work becomes available in a suitable classification, and [fol. 438] before other persons are hired for such work, in the order required by the Respondents' normal seniority system or other nondiscriminatory practices.

It will be further recommended that the Respondents be ordered to make whole Frank Ciccone and each of the employees listed in Schedule A for any loss of pay they may have suffered as a result of the discrimination against them. In the case of Frank Ciccone the back-pay period shall run from November 10, 1950. In the cases of the employees listed on Schedule A, the back-pay period, for reasons earlier stated in this Report, shall run from March 9, 1951. In the case of each employee ordered reinstated, back pay shall run to the date of the Respondents' compliance as to him with the reinstatement provisions hereof. Consistent with the policy of the Board enunciated in *F. W. Woolworth Company*, 90 N. L. R. B. 289, losses of pay shall be computed on the basis of each separate calendar quarter or portion thereof during the appropriate back-pay period. The quarters shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which the employees normally would have earned for each quarter or portion thereof, their net earnings, if any, in their employment during that quarter.[49] Earnings in any particular quarter shall have no effect upon the back-pay liability for any other quarter. It is also recommended that the Respondents be ordered to make available to the Board upon re-

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[49] See *Crossett Lumber Company*, 8 NLRB 440; *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

quest payroll and other records to facilitate the checking of the amount of back pay due.

[fol. 439] It is further recommended that the Board reserve the right to modify the back pay and reinstatement provisions, if made necessary by a change of circumstances since the hearing or in the future, and to make such supplements thereto as may hereafter become necessary in order to define or clarify their application to a specific set of circumstances not now apparent.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Local 22045, American Federation of Labor; Local 3127, United Brotherhood of Carpenters and Joiners of America; and Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers are labor organizations within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents have engaged in, and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By rendering unlawful assistance and support to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, the Respondents have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

4. By discriminating in regard to the hire and tenure of employment of Frank Cicconè and the employees listed in Schedule A, thereby discouraging membership in Local 3127 and encouraging membership in Local 318, the Respondents have engaged in, and are engaging in unfair la-
[fol. 440] bor practices within the meaning of Section 8 (a) (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. The strike which began on November 10, 1950, was caused, and thereafter prolonged, by the aforesaid unfair labor practices.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, it is hereby recommended that Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc., of New York City, their respective agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, or in any other labor organization of its employees, and encouraging membership in Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or in any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Discharging or discriminatorily refusing to reinstate or reemploy employees for the reason that they engaged in strike or concerted activities protected by the Act;

(c) Sponsoring, or rendering assistance and support to Local 318, International Brotherhood of Pulp, Sulphite [fol. 441] and Paper Mill Workers, or to any other labor organization, to become collective bargaining agent of their employees;

(d) In any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 3127, United Brotherhood of Carpenters and Joiners of America, or any other labor organizations; to refrain from joining or assisting Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement, requiring membership in a labor organization as a

condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Frank Ciccone and the employees named in Schedule A full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as provided in the section above, entitled "The remedy";

(b) Make whole Frank Ciccone and the employees named in Schedule A in the manner set forth in the section above, entitled "The remedy," for any loss of pay they may have suffered by reason of the Respondents' discrimination against them;

[fols. 442-443] (c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this recommended order;

(d) Post at its plant copies of the notice attached hereto, marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being signed by the Respondents' representatives, be posted by the Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by other notices;

(e) Notify the Regional Director for the Second Region, in writing, within twenty (20) days from the receipt of this Intermediate Report, what steps the Respondents have taken to comply herewith.

It is further recommended that, unless the Respondents shall, within twenty (20) days from the receipt of this Intermediate Report, notify the Regional Director for the Second Region in writing that they will comply with the foregoing recommendations, the National Labor Relations

Board issue an order requiring the Respondents to take the action aforesaid.

Dated at Washington, D. C. this 11th day of June 1952.

Arthur Leff, Trial Examiner.

[fol. 444] Before the

National Labor Relations Board

Second Region

[Title omitted]

STATEMENT OF EXCEPTIONS TO THE INTERMEDIATE REPORT—August 5, 1952

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 6, as amended, the undersigned, attorney for the Respondents herein, respectfully files the following Statement of Exceptions to the Intermediate Report of Trial Examiner Arthur Leff, dated June 11, 1952.

1. The Trial Examiner erred in concluding that Respondents' representatives prompted O'Neill to visit the offices of Local 318 on October 20, 1950. There being no evidence in the record justifying the conclusion, the testimony upon which it is based, to the effect that O'Neill informed the other employees of that fact, is inconsistent with other testimony of the same witnesses (Record 229 and passim) indicating that the said employees wished to inform Maccaferri.

2. The Trial Examiner erred in concluding that between November 8 and November 10, 1950, Maccaferri determined [fol. 445] to maintain employee adherence to Local 318. The record is devoid of evidence of activity tending to foster Local 318, between the determination of the week ending October 23, 1950, and the instant at which the strike occurred.

3. The Trial Examiner erred in concluding that Maccaferri conditioned a return to work on abandonment of

membership in Local 3127. The record is devoid of any evidence of such condition, the evidence being limited to solicitation to abandon the strike.

4. The Trial Examiner erred in concluding that Maccaferri's instruction to Ciccone was discriminatory, and in misapprehending the nature of Respondents' contentions with respect thereto. The conclusion ignores undisputed record evidence that the confinement of Ciccone to the machine shop was a temporary confinement during a prospective absence of short duration on the part of Maccaferri (Record 1176, 1239, 1247) on a day of tension (Record 1179, 1217, Respondents' Exhibit 13), and further in concluding, if he did conclude, that a temporary restriction, although it may operate in a discriminatory manner, may be justified in order to forestall disruption; and further the Trial Examiner erred in attempting to balance, upon inadequate evidence, the degree of accommodation to the competing unions respectively where there was evidence (Record 418, 854 and passim) that both unions had been accorded some latitude.

5. The Trial Examiner erred in concluding that the discharge of Ciccone, if based upon mistakenly reported, but incomplete, facts as to his disobedience of the order, was discriminatory.

6. The Trial Examiner erred in concluding that the strike which began on November 10, 1950, resulted from [fols. 446-447] the cumulative effect upon the employees of the Respondents' unfair labor practices, especially in view of the Trial Examiner's own conclusion (Int. Rep. sec. J, pp. 18, 19) to the effect that the machine shop group, which struck first, struck under a misapprehension of fact.

7. The Trial Examiner erred in concluding that the strike constituted a protected concerted activity in the face of the established defense of contract violation.

8. The Trial Examiner erred in concluding that the strikers were engaged in protected concerted activities in the face of the established defense of engagement in a strike within the prohibited period of Section 8(d) of the Act.

Dated: New York, New York, August 5, 1952.

Bernard H. Fitzpatrick, Attorney for Mastro Plastics Corp. and French-American Reeds Manufac-

turing Co., Inc., Respondents, 60 Wall Street, New York 5, New York.

To:

National Labor Relations Board, Washington 25, D. C.

Vincent M. Rotolo, Esq., Counsel for General Counsel, National Labor Relations Board, 2 Park Avenue, New York 16, New York.

Abraham H. Saul, Esq., Counsel for Charging Party, 130 West 42nd Street, New York 18, New York.

[fol. 448] Before the

National Labor Relations Board

DECISION AND ORDER.—March 13, 1953

103 NLRB No. 51 D-7020

New York, N. Y.

In the Matter

of

MASTRO PLASTICS CORP. and FRENCH-AMERCAN REEDS MANUFACTURING CO., INC.,

and

LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

Case No. 2-CA-1799

On June 11, 1952, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report together with supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error

[fol. 449] was committed.[1] The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:[2]

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[1] During the course of the hearing, the Board denied the Respondents leave to appeal several rulings of the Trial Examiner on the ground that the issues could best be resolved on the basis of a full record. The Respondents moved to strike all allegations of the complaint which concerned the strike at the Respondents' plant and the strikers on the ground that the employee status of the strikers had become a representation matter. During the strike at the Respondents' plant, the Board issued a Decision and Direction of Election, Case No. 2-RC-3170, January 29, 1951, not reported in printed volumes of Board decisions. The petition in that case was filed by the charging union herein. The Direction contained the proviso that strikers and replacements could vote under challenge and was later amended to defer the election until "such time as the Regional Director deemed appropriate" because of the filing of the charges in the instant case. The Respondents contend, in their motions to strike, that the Board was without power to refer issues concerning the strikers to a Trial Examiner and that the Trial Examiner was without jurisdiction to hear evidence on such issues because Section 9 (c) of the Act provides that representation matters should be heard by an officer or agent of the Board who can make no recommendations. The Trial Examiner denied the motions based on this argument and his ruling is hereby affirmed. Cf. *Times Square Stores Corporation*, 79 NLRB 361.

[2] The following minor corrections of the Trial Examiner's findings are noted: (1) While the Union's notice of intent to terminate or modify the contract was dated September 29, 1950, it was not delivered to the Employer until October 10; (2) The evidence clearly shows, as found by the Trial Examiner and adopted by the Board, that Maccaferri feared that Local 22045 was not strong enough to cope with the organizational efforts of Local 65 the Wholesale and Warehouse Workers rather than, as inadvertently

[fol. 450] 1. The Board finds, as did the Trial Examiner, that the Respondents engaged in extensive interference, restraint, and coercion of their employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby violated Section 8 (a) (1) of the Act.

2. The Board finds, as did the Trial Examiner, that the Respondents rendered unlawful support and assistance to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, and thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act. The General Counsel excepts to the failure of the Trial Examiner to recommend that the Respondents withhold recognition from Local 318 unless and until such time as it might be certified by the Board as the bargaining representative of Respondents' employees. In view of the nature and extent of the Respondents' support and assistance as shown by the record, we find merit in the exception. Accordingly, in order to restore the status quo and to free the employees from this restraint upon their freedom to achieve self-organization, we shall order that the Respondents withhold all recognition from Local 318 as the representative of their employees for the purpose of dealing with the Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until it is certified by the Board as such representative.[3]

3. We further find, in accord with the Trial Examiner, that the Respondents discriminatorily discharged, and thereafter refused to reinstate, Frank Ciccone because of

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noted at one point in the Intermediate Report the efforts of Local 318 of the Paper Mill Workers; and (3) The Trial Examiner, having found and concluded correctly that the Respondents had unlawfully assisted and supported Local 318, inadvertently stated, under the heading "Concluding findings" that the Respondents thereby violated Section 8 (a) (3) of the Act by such conduct rather than Section 8 (a) (2). None of these inaccuracies or inadvertencies in the Trial Examiner's Report is of such a nature as to affect his ultimate conclusion, or our concurrence therein.

[3] See *Julian Freirich Co., et al.*, 86 NLRB 542.

his organizational activities in support of the charging [fol. 451] union. It is clear that this discharge and refusal to reinstate, motivated by Respondents' support of Local 318 and its animus toward rival organizations, constituted a discriminatory action with regard to Ciccone's hire and tenure of employment which thereby discouraged membership in the charging union, encouraged membership in Local 318, and interfered with, restrained, and coerced Respondents' employees in the exercise of the rights guaranteed in Section 7 of the Act.

4. We also find, in agreement with the Trial Examiner, that the work stoppage of November 10, was a strike, rather than a lockout, but that it was clearly caused and prolonged by the cumulative effects of the Respondents' unfair labor practices culminating in the discriminatory discharge of Ciccone. The Respondents, however, strongly urge in their exceptions that the Trial Examiner was in error in finding that this strike constituted concerted activity which was protected by the Act. They make this contention on the basis of two affirmative defenses, both of which were found without merit by the Trial Examiner.

The Respondents first contend that the strike was an action in breach of contract and therefore cannot be held to be protected activity. The contract in existence between the Respondents and Local 22045, American Federation of Labor,[4] during the period of time pertinent here, contained a clause stating that:

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employer, or any inter- [fol. 452] ruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

This contract did not expire until November 30, 1950, and the Respondents argue that the strike of November 10, tak-

[4] The incumbent union at the Respondents' plant in the period in question. As related by the Trial Examiner, the membership of Local 22045 took steps shortly before the strike to transfer affiliation to the charging union.

ing place as it did during the term of this contractual pledge, breached the contract and is therefore not entitled to the protection of the Act under the *Scullin-Dyson* doctrine.[5] The Trial Examiner found on the contrary that the contract did not indicate an intention by either party to waive the usual right of self-help to correct abuses "unrelated to the actual operation of the contract or the normal relationship of the parties but arising, as in this case, from a wilful and serious violation of law designed to destroy the very foundation of that contract and that relationship". He further found that, as an equitable matter, the Respondents should not be allowed to assert, as a defense, a strike which was caused by their own wilful, deliberate, widespread and grave unfair labor practices.

The Board, under the *Scullin-Dyson* doctrine, has held that economic strikes in violation of no-strike contract clauses are not protected activity. In both the *Scullin* and *Dyson* cases, however, the Board noted the absence of any prior breach of contract or unfair labor practices on the part of the employer. In *National Electric Products*,[6] the [fol. 453] doctrine was applied despite the fact that the strike stemmed from an action of the employer found to be in violation of the Act. In that case, the discharge of an employee for dual union activity was requested by the incumbent union and the employer acquiesced under the terms of the union-shop provisions of the parties' contract. The same contract contained a no-strike pledge but a strike was conducted by the employees at the plant in protest against the discharge. The discharge was found by the Board to be in violation of the Act under the *Rutland Court* rule[7] but the strikers were held to be engaged in unpro-

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[5] *Scullin Steel Company*, 65 NLRB 1294; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445.

[6] 80 NLRB 995. *Chairman Herzog* concurred specially in the decision, with *Board Member Houston* dissenting.

[7] *Rutland Court Owners*, 44 NLRB 587, 46 NLRB 1040, subsequently overruled by the Supreme Court in *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355.

tected activity because of the no-strike pledge. The Board majority held:

> "The right to strike, although protected by the Act, *may be waived by the employees in an agreement concluded through the collective bargaining process.* * * * As we have heretofore emphasized, 'no-strike' clauses * * * are designed to forestall the use of even permissive economic weapons and to substitute settlement by collective bargaining, and tend to realize the purposes of the Act by encouraging the practice and procedure of collective bargaining rather than resort to industrial warfare". (emphasis supplied)

We do not consider that the *National Electric Products* case furnishes authority or rationale for sustaining the Respondents' defense here. The essential differences between the facts of the cases are patent. In the earlier case, the discharge which instigated the strike was an action [fol. 454] required by and in accord with the contract between the representative of the employees and their employer. In the present situation, the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents. In the *National Electric Products* case, the employees waived their right to strike action as to matters settled and agreed upon in the contract. In the instant case, we can perceive no rational or legal basis on which to assume that the employees contemplated or, in fact, executed a waiver of self-help under the conditions imposed by the Respondents which gave rise to the strike of November 10. The contract itself provides for arbitration, rather than strike or lockout economic pressure, to settle "differences * * * between either of the Employers and the Union or its members as to the meaning and application of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." The November 10 strike was, as conclusively shown by the record, a protest against unfair labor practices apart from the terms, meaning and application of the contract and in no manner was an at-

tempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees.

On the entire record, we find that the no-strike clause of the contract between the Respondents and Local 22045 did not contemplate or incorporate a waiver of strike action on the part of the employees under the circumstances present [fol. 455] on November 10.[8] Accordingly, we find no merit in the contention of the Respondents that the strike of that date was in breach of contract and was activity unprotected by the Act.[9]

The Respondents also contend, as an affirmative defense, that the strike was in violation of the terms of Section 8

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[8] The Board also finds no merit in the Respondents' contention that Section 13 of the Act prevents the Board from overruling the breach of contract defense. Section 13, discussed more fully hereafter with regard to the Respondents' second affirmative defense, enjoins constructions *of the statute* which "affect" limitations on the right to strike. It is sufficient to note, in this regard, that it is not the Act or any part thereof which has been construed herein to limit the no-strike clause, relied upon by the Respondents, but the terms and scope of that clause itself.

[9] *Chairman Herzog*, although dissenting as to the disposition made of the second defense raised by the Respondents, concurs in the finding that the strike herein was not in breach of contract. The *Chairman*, like the Trial Examiner, calls attention to the rationale contained in his concurring opinion at page 1002 of the 1949 *National Electric Products* decision. *Member Peterson* joins in this rationale.

Member Murdock reserves opinion on the breach of contract issue which it is unnecessary for him to reach in view of his dissenting conclusion that Section 8 (d) deprived the strikers, in any event, of the status of employees protected by the Act.

Members Houston and Styles, while concurring in the finding that this particular contract no-strike clause did not contemplate a waiver of self-help under the conditions present herein, would further find that a no-strike clause is inapplicable where a strike is caused by the unfair labor practices of the employer.

(d) of the Act and that, as a result, the participants lost their employee status under the mandate of that section. The Board Members, otherwise unanimous, divide on this issue.

The Trial Examiner rejected this defense on the ground that Section 8 (d) was not applicable to an unfair labor practice strike not called or continued in order to force modification of a contract. The Respondents except to this ruling on two grounds. First, they assert that Section 13 of the Act prohibits the Board from construing the Act and [fol. 456] Section 8 (d) so as to affect limitations on the right to strike. Secondly, they dispute the conclusion of the Trial Examiner on the ground that Congress clearly intended to prohibit all strikes, economic or unfair labor practice, during the 60 day period specified in the statute.

The lack of merit in the first of the Respondents' arguments on this issue is inherent in the language of Section 13, itself. That Section provides that:

> "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as to interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right".

Section 13, it is therefore clear, prohibits constructions of the statute affecting limitations on the right to strike. It also, however, prohibits constructions which "interfere with or impede or diminish in any way" the right to strike except as *specifically* provided for in the Act. This two edged approach of the section is as much a legal barrier, therefore, to a Board construction broadcasting the scope of Section 8 (d), if the limitation on strikes in that section is clearly to apply only to strikes to force contract action, as it is to restricting the limitations on strikes in that section if Section 8 (d) is clearly to apply to any strike. It is apparent, accordingly, that the issue must be resolved by the terms of Section 8 (d) alone.

Section 8 (d) provides, in part,

> "That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also

mean that no party to such contract shall terminate [fol. 457] or modify such contract, unless the party desiring such termination or modification

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:*

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree [fol. 458] to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. *Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the em-*

ployer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (emphasis supplied).

The contract herein, between Local 22045 and the Respondents, expired on November 30, 1950. The formal notice of an intent to modify the contract was not served on the Respondents by Local 22045 until October 10. It is the Respondents' contention, therefore, that as the strike admittedly took place less than 60 days after the notice was tendered, the strikers lost their status as employees. As noted, the Trial Examiner rejected this argument finding that Section 8 (d), viewed in its entirety, applied to economic strikes and strikers rather than, as here, to an unfair labor practice strike called and continued for issues apart from negotiation of a new or revised contract.

The Board has previously construed Section 8 (d) as having the "prime purpose" of preventing "so-called 'quickie' strikes designed to secure termination or modification of collective bargaining agreements".[10] Moreover, [fol. 459] in the recent *Thayer* case,[11] where the section was also posed as a defense in an unfair labor practice strike situation, the Board indicated clearly that it considered the ambit of Section 8 (d) to be limited in scope to the contract modification or termination area. There we held that

"* * * by its terms [Section 8 (d)] applies only to strikes to terminate or to secure a modification or in-

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[10] *United Packinghouse Workers of America, CIO (Wilson & Company, Inc.)*, 89 NLRB 310, which concerned another, different problem arising from the enforcement and administration of the section.

[11] *H. N. Thayer Company, et al.*, 99 NLRB No. 165, where the Board grounded its rejection of a Section 8 (d) defense on the specific facts of the case, where the striking union was never recognized as the representative of the employees and thus was not a party to the contract subject to the restrictions of Section 8 (d).

terpretation of a collective bargaining contract. The finding that the present strike was an unfair labor practice strike therefore takes the strike itself outside the purview of Sec. 8(d)".

While it is true that the Board did not find it necessary to base its rejection of the Section 8 (d) contention in that case upon the ground quoted, we find no reason to reject the reasoning expressed therein. Although the Respondents and our dissenting colleagues contend that the Congress intended that all strikes, economic or unfair labor practice alike, should be covered by the prohibition in that section, we fail to discern any such intention expressed by proponents of the legislation when it was enacted in 1947. The section itself, as we have pointed out, is unmistakeably designed to control and deal with a distinct facet of labor-management relationships, *i. e.*, the critical period of collective bargaining negotiations preceding the termination or modification of a contract. The Congressional concern and intent, as reiterated many times during consideration of the section in 1947, was to prevent the use of economic pressures such as strikes and lock-outs [fol. 460] for reasons connected with contract negotiation from impending or disrupting collective bargaining during that critical period.[12] In short, the Congress prohibited

[12] See, for example, the statement of Senator Ball, a proponent of the 1947 amendments including Section 8 (d). He stated, in defining the objectives of the latter, "The provision in the National Labor Relations Act defining collective bargaining, and providing where a contract between a union and an employer is in existence, fulfilling the obligation on both sides to protect (sic) [bargain] collectively means giving at least 60 days' notice of the termination of the contract, or of the desire for any change in it, is another provision aimed primarily at protecting the public, as well as the employee, who have been the victims of 'quickie' strikes. I do not think that is taking away the rights of labor or of unions either one; it is simply saying that they should all follow the sound, fair, and sane procedure which a majority of the good ones now follow." (Congressional Record, 80th Congress, May 12, 1947, p. 5146.)

either labor or management from using strike or lock-out pressures in the frame of contract negotiations in preference to peaceful bargaining devices. To adopt the view of our dissenting colleagues would be to find that Congress intended, despite this clear concern and attention throughout the section to contract negotiation, to render a labor organization helpless for a set period against unfair labor practices totally unconnected with the problems of contract termination or modification. This view we cannot ascribe to Congress in the absence of any expressed legislative intent or desire.

Accordingly, we find that Section 8 (d) did not deprive the strikers at Respondents' plant of their employee status. In accord with the Trial Examiner, we further find that by discharging the employees listed in Schedule A, attached hereto, on December 11, 1950, and thereafter refusing to reinstate said employees following unconditional application for reinstatement made on their behalf, the Respondents violated Section 8 (a) (1) and 8 (a) (3) of the amended Act. Like the Trial Examiner, we shall there-[fol. 461] fore order the Respondents to offer to the employees listed on Schedule A, together with Frank Ciccone, full reinstatement to their former or substantially equivalent positions as set forth in the Intermediate Report under the heading "The remedy". We note, however, that while the application for reinstatement was made on March 9, 1951, it was not received by the Respondents until March 12. Accordingly, back pay for employees listed in Schedule A shall be assessed from March 12 rather than the earlier date.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc., New York City, their respective agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, or in

any other labor organization of their employees, and encouraging membership in Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or in any other labor organization of their employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Discharging or discriminatorily refusing to reinstate or reemploy employees for the reason that they engaged in strike or concerted activities protected by the Act;

[fol. 462] (c) Sponsoring, or rendering assistance and support to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or to any other labor organization, to become collective bargaining agent of their employees;

(d) In any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 3127, United Brotherhood of Carpenters and Joiners of America, or any other labor organizations, to refrain from joining or assisting Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Frank Ciccone and the employees named in Schedule A full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole Frank Ciccone and the employees named in Schedule A for any loss of pay they may have suffered by reason of

the Respondents' discrimination against them, in the manner described in the Remedy section of the Intermediate Report as amended herein;

[fol. 463] (b) Withhold all recognition from Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers as the exclusive bargaining representative of their employees for the purpose of dealing with the Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said Local 318 shall have been certified by the Board as the representative of such employees;

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amounts of back pay due and the rights of employment accruing under the terms of this Order;

(d) Post at their plant copies of the notice attached hereto as Appendix A.[13] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondents' authorized representatives, be posted by the Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

[fol. 464] (e) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date

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[13] In the event that this Order is enforced by a decree of a United States Courts of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

of this Order, what steps the Respondents have taken to comply herewith.

Signed at Washington, D. C., Mar. 13, 1953.

John M. Houston, Member, Paul L. Styles, Member, Ivar H. Peterson, Member, National Labor Relations Board (Seal).

Paul M. Herzog, Chairman, and Abe Murdock, Member, dissenting in part only:

While we find, in agreement with our colleagues, that the Respondents clearly committed violations of Section 8 (a) (1), 8 (a) (2), and 8 (a) (3) of the Act, we are unable to join in the conclusion of the majority opinion that the strike of November 30 was protected activity. It is our considered belief that the strike on that day was in contravention of the explicit mandate of Section 8 (d) of the present Act and that the strikers, as a result, lost the status of employees protected by the statute.

Secion 8 (d), as noted in the majority opinion, directs that contracts shall not be modified or terminated unless certain specified conditions are met. Among those conditions are provisions for a 60-day notice prior to the date of the desired modification or termination, and for notification to mediation agencies of the existence of a dispute. As our colleagues of the majority admit, Congress in enacting the provisions of Section 8 (d) was concerned with the problem of industrial unrest that often arises [fol. 465] when collective bargaining contracts are in process of revision or termination. There is no question but that Congress concluded that labor-management relationships could be stabilized by enforcing certain specified rules to govern and control the parties' actions during these periods of stress and possible conflict. The provision was accordingly added that resort to the economic weapons of strike and lockout was forbidden to both employers and employees during the 60-day period following notice of intent to terminate or modify a contract. The prohibition was then emphasized, although only insofar as employees are concerned, by the additional sanction of loss

of employee status for workers who engaged in strikes during that period.

There is no question here but that the strike of November 10 was called and conducted before the expiration of the 60 day period following the Union's notification to the Respondents that it wished to revise the contract then about to terminate. We agree with our colleagues' finding that the strike was one caused and precipitated by the Respondents' unfair labor practices. The instant case thus poses the question whether Section 8 (d) permits the Board any discretion to differentiate between types and classes of strikes according to their motivation, or to apply the sanction of the statute to some, but not all, strikes. We believe the answer must be in the negative.

The language used in Section 8 (d) does not distinguish as to what types of strikes or lockouts are prohibited during the 60-day period. The instruction to labor, management and this Board is short and explicit. The parties must continue the provisions of the contract in full force [fol. 466] and effect during this period "without resorting to *strike or lockout.*" Any employee "who engages in *a strike*" within the 60 days shall lose his status as an employee. No limitation or qualification, express or implied, appears in the text to indicate a Congressional intent to limit the sanction to "economic strikers" and to allow freedom of action to those striking in response to unfair labor practices. The coverage is clear and all inclusive. If, as urged by the majority, the Congress did intend to limit the scope of the prohibition to economic strikes or, at most, to strikes within the frame of contract negotiation, the section is barren of any supporting indication. On the contrary, we consider that this very failure to incorporate any such qualifying language, when it might easily have been added, underlines the fact that the clear intent of the section was to prohibit all work stoppages during this period.

Section 8 (d) being plain and unambiguous in this respect, there is no need to resort to legislative history to plumb its meaning.[14] The Congressional hearings and debates which accompanied its enactment, if considered, how-

[14] *N. L. R. B.* v. *Daut & Russell, Limited*, 73 S. Ct. 375.

ever, make the majority opinion interpretation of the section even more untenable. The opponents of the Taft-Hartley revisions of the Wagner Act in 1947, on numerous occasions noted and emphasized the broad coverage of Section 8 (d). Thus, the Senate Minority Report stated:[15]

> "Moreover, the section is silent as to the Board's authority to accommodate conflicting issues such as provocation on the part of the employer. Under this section an employer desirous of ridding himself either of the employees or their representative can engage in [fol. 467] the most provocative conduct without fear of redress except by way of a lengthy hearing before the Board and a subsequent admonition to thereafter 'cease and desist' from such practices. In striking contrast to the relatively delicate treatment provided for such action by an employer, *employees unwilling idly to countenance abuse, who resort to self-help under the circumstances, are removed from the protection of the statute and lose 'employee status.'* An employer is at liberty under such circumstances freely to replace any employee bold enough to insist upon justice. *The provision denies to the Board the exercise of any discretion to accommodate the equitable doctrine of 'clean hands'. The provisions of the section are conclusive —the employee is subject to summary dismissal irrespective of the employer's conduct.*" (Emphasis supplied)

To this, as to other statements of the same tenor, or denial was made by the proponents of the legislation. The Senate Majority Report,[16] indeed, reiterated that "*any* employee who engaged in a strike during the 60 day period [specified in Section 8 (d)] would lose any rights under Sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed." (emphasis supplied). Even apart from the clear import of the statement, its reference to the loss of rights under Section 8 would be pointless unless Section 8 (d)

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[15] *Senate Minority Report No. 105, p. 2 on S. 1126, 80th Congress.*

[16] *Senate Report, No. 105 on S. 1126, 80th Congress.*

was clearly to include unfair labor practice strikes with all other strikes among the prohibited conduct.

It is true that the Board has, on prior occasion, referred to the "prime purpose" of Section 8 (d) as being to eliminate "quickie strikes." [fol. 468] However, the fact that such strikes, presumptively economic, were the prime object of the statute, cannot diminish the broad wording of the section or the wider area of action which it also was intended to govern. Nor is the *dictum* of the *Thayer* [17] case, which admittedly was decided on a totally different ground, controlling. While the result of the application of Section 8 (d) in the instant case may indeed appear inequitable in the light of the extensive unfair labor practices committed by the Respondents, such equitable considerations are not within our power to apply. To us, the conclusion is inescapable that Congress determined in 1947 that the cause of industrial peace would best be served by total elimination of the use of economic weapons, no matter what the provocation, during the critical period of contract renegotiation. As this determination was made a part of the statute in Section 8 (d), it is not the province or the prerogative of this Board to question or to alter it.

Accordingly, as the strike of November 10 was called and conducted before the end of the 60-day period specified by the statute, we must find that it was not protected concerted activity and that the strikers lost the status of employees entitled to reinstatement.

Signed at Washington, D. C., Mar. 13, 1953.

Paul M. Herzog, Chairman, Abe Murdock, Member, National Labor Relations Board.

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[17] *H. N. Thayer Company*, 99 NLRB No. 165.

[fol. 469] APPENDIX A TO DECISION AND ORDER

Notice to all Employees

Pursuant to

a Decision and Order

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, or in any other labor organization of our employees, or encourage membership in Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment, or any terms or conditions of employment.

We Will Not discharge or discriminatorily refuse to reinstate or reemploy any of our employees for engaging in strike or concerted activities protected by the Act.

We Will Not recognize the afore-mentioned Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, as the exclusive bargaining representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified by the Board as the representative of our employees.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their [fol. 470] right of self-organization, to form labor organizations, to join or assist Local 3127, United Brotherhood of Carpenters and Joiners of America, or any other labor organization to refrain from joining or assisting Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the

extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them:

Alturi, Rose
Americo, Joan
Amoroso, Rose
Avalo, Jose
Bowerman, Jean
Boyd, James
Brender, Morris
Bruno, Angelo
Bryant, Edith
Ciccone, Frank
Cirillo, Joseph
Crawford, Katherine
Delbagno, Thelma
De Minno, Rose
De Turo, Michael
Diaz, Luis
Ebert, Joseph
Eskenazi, Morris

[fol. 471]

Castaldo, Louis
Capers, Flora
Cartagena, Luis
Cascione, Michael
Cheli, Gaetano
Gibson, Vernal
Golpe, Peter
Gonzales, Gloria
Greco, Bernard
Green, Evard
Harris, Joseph
Hernandez, Louis
Herzig, Edwin
Kennedy, Mary
Koiner, Connis
Libutti, Carmine
Maddalena, Lena
Maddalena, Lillie
Maresco, Ralph
Martin, Allen
Martone, Camille
Flamio, Yolanda
Fonagy, Adelajde
Franchi, Fred
Gherardi, Dorothy
Paul, Henry
Pellay, Richard
Petrus, Elizabeth
Pieroni, Peter
Pollina, Charles
Prieto, Rafael
Radice, Antoinette
Rivera, Patricio
Sanchirice, William
Sandhop, William
Squillate, Frank
Saxton, John
Schultz, Henry
Shaw, Ruth
Sills, Estelle
Smith, Isiah
Smolen, Madeline

Matera, Joseph	Tommarello, Frank
Messina, Agnes	Tripolone, Salvatore
Migliore, Anthony	Unger, Alexander
Miller, James	Valentine, Michael
Occhino, Mary	Vargas, Henry
Oleszek, John	Weinberg, Leopold
Olker, Marie	Zimmerspitz, Abraham
Pasculli, Jane	Zinzi, Michael
Pastore, Carmine	

All our employees are free to become, remain or refrain from becoming or remaining, members of the above-named [fol. 472] Local 3127, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

Mastro Plastics Corp., (Employer).

Dated ..... By .....
(Representative) (Title)

French-American Reeds Manufacturing Co., Inc., (Employer).

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Schedule A

Alturi, Rose	Cirillo, Joseph
Americo, Joan	Crawford, Katherine
Amoroso, Rose	Delbagno, Thelma
Avalo, Jose	De Minno, Rose
Bowerman, Jean	De Turo, Michael
Boyd, James	Diaz, Luis
Brender, Morris	Ebert, Joseph
Bruno, Angelo	Eskenazi, Morris
Bryant, Edith	Flamio, Yolanda
Capers, Flora	Fonagy, Adelaide
Cartagena, Luis	Franchi, Fred
Cascione, Michael	Gherardi, Dorothy
Castaldo, Louis	Gibson, Vernal
Cheli, Gaetano	Golpe, Peter.

[fols. 473-475]

Gonzalez, Gloria	Pellay, Richard
Greco, Bernard	Petrus, Elizabeth
Green, Evard	Pieroni, Peter
Harris, Joseph	Pollina, Charles
Hernandez, Louis	Prieto, Rafael
Herzig, Edwin	Radice, Antoinette
Kennedy, Mary	Rivera, Patricio
Koiner, Connis	Sanchirico, William
Libutti, Carmine	Sandhop, William
Maddalena, Lena	Squillate, Frank
Maddalena, Lillie	Saxton, John
Maresco, Ralph	Schultz, Henry
Martin, Allen	Shaw, Ruth
Matera, Joseph	Sills, Estelle
Messina, Agnes	Smith, Isiah
Migliore, Anthony	Smolen, Madeline
Miller, James	Tommarello, Frank
Occhino, Mary	Tripolone, Salvatore
Oleszek, John	Unger, Alexander
Olker, Marie	Valentine, Michael
Martone, Camille	Vargas, Henry
Pasculli, Jane	Weinberg, Leopold
Pastore, Carmine	Zimmerspitz, Abraham
Paul, Henry	Zinzi, Michael

[fol. 476] Before the

National Labor Relations Board

APPENDIX TO MOTION TO MODIFY ORDER AND FOR OTHER RELIEF

OFFER OF PROOF.—May 4, 1953

On behalf of the Employers Respondent, I offer to prove among other things, by the witnesses Abraham S. Saul, Mitchell Shipman, Mario Maccaferri and others the following facts:

I.

(A). That Local 22045, A. F. of L., the collective bargaining agent, made proposals relating to the "no strike" undertaking in the 1949 contract negotiations as follows:

(a) That there be no such undertaking by the Union.

(b) That the Union retain the right to strike in the event of failure of the Employers Respondent to abide by arbitration awards.

(c) That the then existing (1948) contract be modified by removing a strike penalty therein imposed i. e., loss of union shop and checkoff.

(d) That employees have the right to refuse to work on goods destined to a strikebound plant.

(e) That all disputes, whether or not arising from contract be referred to arbitration.

(B) That despite the foregoing proposals no limitation of the scope of the "no strike" undertaking was agreed to other than the elimination of the penalty above described; that no modification of the undertaking was made in respect of the class of non-arbitrable disputes remaining after the proposal to make all disputes arbitrable had been bargained away; and that the provision for referral to arbitration of the question of whether a strike within the meaning of the contract had occurred was retained and extended.

[fol. 477] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

National Labor Relations Board, petitioner,

v.

Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc., respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 141, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents, Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc.,

New York City, New York, their respective agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as "In the Matter of Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc. and Local 3127, United Brotherhood of Carpenters and Joiners of America, Case No. 2-CA-1799."

[fol. 478] In support of this petition, the Board respectfully shows:

(1) Respondents are New York corporations engaged in business in the State of New York, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on March 13, 1953, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents, their respective agents, successors, and assigns. Thereafter, on May 6, 1953, Respondents filed with the Board their Motion to Modify Order and for Other Relief; and on May 25, 1953, the Board issued its Order denying said motion. On June 2, 1953, Respondents filed their Motion to Complete Record, which motion was denied by Board Order issued July 2, 1953. Respondents, on July 20, 1953, filed their Motion to Vacate Order and Stay Proceedings, and the Board denied the same by Order issued July 29, 1953. On March 13, May 25, July 2, and July 29, 1953, the Board's aforementioned Decision and Order, Order denying motion to modify order and for other relief, Order denying motion to complete record, and Order denying motion to vacate order and stay proceedings, respectively, were served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and [fols. 479-480] filing with this Court a transcript of the entire record of the proceedings before the Board upon which the said Orders were entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondents, their respective agents, successors, and assigns, to comply therewith.

(S.) A. Norman Somers, Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this day of 1953.

[fol. 481] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 190.—October Term, 1953

(Argued April 8, 1954 Decided July 16, 1954)

Docket No. 22905

National Labor Relations Board, Petitioner,

—against—

Mastro Plastics Corp., and French-American Reeds Mfg. Co., Inc., Respondents.

Before:

Chase, *Chief Judge*, Swan and Frank, *Circuit Judges*.

Petition for enforcement of an order of the National Labor Relations Board. Order enforced.

George J. Bott, General Counsel, David P. Findling, Associate General Counsel, A. Norman Somers, Assistant General Counsel, Bernard Dunau, Harvey B. Diamond, Attorneys, National Labor Relations Board, Petitioner.

[fol. 482] Butler, Bennett & Fitzpatrick, Attorneys for Respondents, Bernard H. Fitzpatrick, of Counsel.

OPINION—July 16, 1954

Chase, *Chief Judge:*

Local 3127, United Brotherhood of Carpenters and Joiners of America, the bargaining agent for respondents' employees, filed charges against Mastro Plastics Corp., and French-American Reeds Manufacturing Company, Inc., two New York corporations which, though separate corporate entities with separate payrolls, are under the same management, have the same employees and use the same plant. The charges, as amended, were that the respondents had engaged in unfair labor practices in violation of Section 8 (a) (1), (2) and (3) of the Labor-Management Relations Act, 1047. 29 U. S. C. A. § 141 *et seq.* The substance of them was that the respondents by various unlawful means aided Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, in attempting to become bargaining agent for the respondents' employees during a time when they were represented by Local 3127; that an employee, one Frank Ciccone, was discriminatorily discharged because of his membership in, and activities on behalf of, Local 3127, and because of his refusal to join Local 318; that 76 other employees were unlawfully locked out or discharged for the same reasons; and that applications for reinstatement by these employees were rejected. The relief sought was a cease and desist order and reinstatement of the discharged employees with back pay.

Respondents' answer admitted the discharge of Ciccone and the other 76 employees, but denied allegations of unfair labor practices. For affirmative defenses, it was alleged that Ciccone was discharged for violating the instructions [fol. 483] of his superiors and that the employment of the remaining 76 employees was lawfully terminated because they went on strike in violation of a collective bargaining contract and of Section 8 (d) of the Act.

Hearings were held before a trial examiner in New York in March, 1952; findings sustaining the charges were made except as to the alleged lockout; and it was recommended

that the affirmative defenses, which were established in point of fact, be held legally insufficient. On review the Board adopted the findings, conclusions and recommendations of the examiner, with one exception not relevant here, and the respondents were ordered, two members of the Board dissenting, to cease and desist from their unfair labor practices and to reinstate with back pay Frank Ciccone and the other 76 employees named. The unfair labor practices are no longer contested and the only part of the Board's order which is in contention is that requiring reinstatement of employees with back pay.

The facts are set forth in 100 N. L. R. B. No. 51, and only a brief resume of them is now needed. Since 1948, when Local 3127 [1] was certified by the New York State Labor Relations Board, it has been the bargaining agent for the respondents' employees. In August of 1950, Local 65 of the Wholesale and Warehouse Workers Union, which was regarded by the respondents as being communist dominated, started organizational activities among the employees. To combat Local 65 the respondents sought to replace Local 3127 with Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, the latter being a much stronger union, and from the middle of [fol. 484] September until November 20, 1950, the respondents committed rather flagrant unfair labor practices to achieve that end. Local 318 was encouraged, sponsored, and actively assisted by the respondents in signing up the employees; some employees were rewarded for aiding Local 318; and the respondents' officers and supervisors made promises of benefit and threats of reprisal related to membership in the rival unions. These activities culminated, on November 10, 1950, in the discharge of employee Frank Ciccone because of his activities on behalf of Local

[1] Also involved in dispute with the respondents was Federal Labor Union, Local 22045. But, as Local 22045 and Local 3127 were represented by the same persons, used common offices, and as the representation rights of respondents' employees were at various times shifted by them between the two unions, we shall refer to them jointly as Local 3127.

3127 and his opposition to Local 348. His discharge precipitated a strike which, by the following day, involved all of the respondents' employees, and which lasted until March 9, 1951, when application for reinstatement of striking employees was made and denied as to Ciccone and the seventy-six who have been ordered reinstated with back pay.

About three months prior to the applications for reinstatement, on December 11, 1950, some of the respondents' employees returned to work and a form letter was sent to all employees remaining on strike notifying them that their employment had been terminated by reason of their striking in violation of the collective bargaining contract. The contract provision upon which the respondents relied reads as follows:

> 5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.

As "the term of this agreement" did not expire until November 30, 1950, the strike did occur during the term and [fol. 485] so it is contended that the strikers, by breaking the contract, lost the right to reinstatement.

However, since the strike was caused and prolonged by the respondents' unfair labor practices, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract. That clause must be interpreted in the light of the entire contract of which it is an integral part, not as an isolated waiver unrelated to the rest of the agreement; and the inhibition it imposes is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties. Instances of strikes to enforce changes in contract provisions which violate a no-strike clause, of which *Scullin Steel Company*, 65 N. L. R. B. 1294; and *Joseph Dyson & Sons, Inc.*, 72 N. L. R. B. 445, are examples, should be distinguished. The right of

employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition. See *National Electric Products Corporation*, 80 N. L. R. B. 995. Unfair labor practices in violation of the Act were in no way covered by the contract, nor did the contract provide means for combating them or settling disputes arising because of them. And, of course, the respondents' unlawful activities cannot be considered part of the normal relations of the parties.

The respondents also argue that, even if the no-strike clause was not a waiver of the right to strike as to matters outside the contract, it was violated because the strike was caused by the discharge of Ciccone, which was an arbitrable matter under the contract, and that the strike was continued for the sole purpose of securing Ciccone's rein- [fol. 486] statement. Were this assertion accurate as to the cause of the strike and its continuation we would agree. However, the Board found that the strike was caused and prolonged solely by the respondents' violations of the Act. Ciccone's discharge was regarded by the Board, and by the trial examiner, as the spark which set off the strike, not as the essential cause of it, and the evidence amply supports this conclusion.

The main contention by the respondents is that their affirmative defense based on Section 8 (d) of the Act, 29 U. S. C. A. § 158 (d), should have been sustained. On October 10, 1950, Local 3127 notified the respondents in the required manner of their desire to negotiate for the modification of the existing collective bargaining contract. This brought into operation Section 8 (d), which provides that contracts may not be modified except under certain circumstances: the party seeking modification must serve notice on the other party sixty days prior to the time of the proposed modification, there must be an offer to meet and confer for purposes of negotiation, mediation agencies must be notified, and the existing contract must be continued in full force and effect during the sixty day period

following notification, without resort to strike or lock-out. It is further provided in subdivision (d) (4) that "Any employee who engages in a strike within sixty-day period * * * shall lose his status as an employee * * * for the purpose of sections 8-10 of this Act * * *"

If the word "strike" in the just mentioned subdivision is to be read as meaning "any strike" however caused and regardless of its objectives, all of the strikers ceased to be employees when they went on strike and none were entitled to reinstatement.

The Board has found by adopting the trial examiner's findings which were based upon ample evidence that the strike was caused solely by the unfair labor practices of [fol. 487] the respondent and was not motivated by any purpose so to obtain any economic advantage by way of contract modification. And so the question is squarely presented as to whether the statutory deprivation of employee status applies to strikers whose sole purpose is to protest against unlawful conduct on the part of the employer and to remedy unfair labor practices which constitute such conduct.

In order to arrive at the true meaning of the word "strike" as used in this subsection, its relation to the purpose of the subsection as a whole must be given due consideration. Though some statutes may be so simple in language and purpose that when all the words are read literally and inclusively the exact meaning clearly appears, often that is not so and it isn't in this instance. As usually must be done in interpreting a statute, all of its provisions should be read in the light of the legislative purpose and with reference to each other. *United States* v. *Boisdore's Heirs*, 8 How. 113; *Duparquet Co.* v. *Evans*, 297 U. S. 216.

Section 8(d) (4) of the Act deals with the obligation to bargain collectively in good faith and particularly with the termination or modification of existing bargaining contracts. After making provision for procedures looking toward the attainment of such ends, which contain conditions applicable both to employer and employees, a sanction is imposed upon employees as a coercive measure to prevent their use of the strike either to obtain or to prevent the termination or modification of a collective bargain-

ing contract. The "sixty-day period" is a special period during which the status quo ante is to be maintained in respect to employer-employee relationships while the statutory method for bargaining as to existing contracts set up in the subdivision is being used; and a "strike within the sixty-day period" means a strike in interference with the use of that method. In other words, it is tied to the method by the modifying words "within the sixty-day [fol. 488] period" and that tie limits the sanction Congress imposed upon the employees involved in the use of the statutory method and excludes strikes which are still protected activities because they are unconnected with the use of the method. Were this not so, we would have to attribute to Congress the intent not merely to provide for an orderly way to terminate or modify existing collective bargaining agreements but the intent both to give an employer, by taking advantage of the method, an opportunity to indulge in unfair labor practices which employees would, perhaps, find it too hazardous to resist quickly and effectively by means of a strike, and to require employees, who used the method, to do so on pain of giving the employer just such an opportunity. It would discriminate, in respect to the right to resist unfair labor practices by striking, between employees working under a collective bargaining contract and those who were not and between unions who were satisfied with such existing contracts and those who were not. And it would penalize the latter for attempting lawfully to remedy their condition by peaceful bargaining. In view of the well known purpose of the Act to prevent industrial strife, such an intent should not be attributed to Congress until, and unless, it sees fit to say so in clear and uncertain terms.

It has been said that the provision in Section 13 that, "Nothing in this Act except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications upon that right" requires a conclusion opposite to that reached. That, of course, is not so unless we are wrong in holding that there is no limitation upon the right to participate in an unfair labor practice strike. In so far as here relevant, it pre-

supposes a limitation and has no significance as to whether there is one. In *Local No. 3 etc.* v. *National Labor Rela-* [fols. 489-491] *tions Board*, 8 Cir., 210 F. 2d 325, it was held that the employer had not been guilty of an unfair labor practice in the discharge of employees. It was, accordingly, not an unfair labor practice strike. Perhaps that serves to distinguish that case from this but, if not, we find ourselves in respectful disagreement.

A motion by the respondents to reopen the proceedings for the introduction of additional evidence as to the meaning of the no strike clause in the contract was made before the Board and denied. A motion has been made here to remand to the Board for that purpose pursuant to Section 10 (e) of the Act. Apparently the movants had an opportunity to adduce such evidence at the hearings and failed to avail themselves of it. At least we are not satisfied by the showing here made that there are reasonable grounds for their failure to present such evidence at those hearings and the motion is denied.

Order enforced.

SWAN, *Circuit Judge*, dissenting in part:

For the reasons well stated in the opinion of the dissenting members of the Board, I would deny enforcement of the reinstatement provisions of the order.

[fol. 492] UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—August 10, 1954

A petition for a rehearing having been filed herein by counsel for the respondents,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

[fol. 493] [File endorsement omitted.]

[fol. 494] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 22905

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC., Respondents

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed August 19, 1954

Before:

Chase, Chief Judge, Swan & Frank, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 13, 1953. The Court heard argument of respective counsel on April 8, 1954 and has considered the briefs and the transcript of record filed in this cause. On July 16, 1954, the Court, being fully advised in the premises, handed down its decision enforcing the said order. In conformity therewith it is hereby

Ordered, Adjudged and Decreed that the Respondents Mastro Plastics Corp. and French American Reeds Manufacturing Co., Inc., New York City, their respective agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, or in any other labor organization of their employees, and encouraging membership in Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or in any other labor organization of their employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Discharging or discriminatorily refusing to reinstate or reemploy employees for the reason that they engaged in strike or concerted activities protected by the

National Labor Relations Act, as amended (hereinafter referred to as the Act),

[fol. 495] (c) Sponsoring, or rendering assistance and support to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or to any other labor organization, to become collective bargaining agent of their employees;

(d) In any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 3127, United Brotherhood of Carpenters and Joiners of America, or any other labor organizations, to refrain from joining or assisting Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer Frank Ciccone and the employees named in Schedule A full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole Frank Ciccone and the employees named in Schedule A for any loss of pay they may have suffered by reason of the Respondents' discrimination against them, in the manner described in the Remedy section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated June 11, 1952, as amended in the Board's decision and order dated March 13, 1953;

(b) Withhold all recognition from Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers as the exclusive bargaining representative of their employees for the purpose of dealing with the Respondents concerning grievances, labor disputes, wages, rates of pay,

hours of employment, or other conditions of employment, [fol. 496] unless and until the said Local 318 shall have been certified by the Board as the representative of such employees;

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amounts of back pay due and the rights of employment accruing under the terms of this Decree;

(d) Post at their plant copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director, of the National Labor Relations Board for the Second Region, New York, New York, shall, after being duly signed by the Respondents' authorized representatives, be posted by the Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps the Respondents have taken to comply herewith."

/s/ Harrie B. Chase, Judge, United States Court of Appeals for the Second Circuit, Jerome N. Frank, Judge, United States Court of Appeals for the Second Circuit.

Filed:

[fol. 497] APPENDIX A TO DECREE, ETC.

Notice to All Employees

Pursuant to

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor

Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, or in any other labor organization of our employees, or encourage membership in Local 318, International Brotherhood of Pulp, Sulphite and Mill Workers, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment, or any terms or conditions of employment.

We Will Not discharge or discriminatorily refuse to reinstate or reemploy any of our employees for engaging in strike or concerted activities protected by the Act.

We Will Not recognize the aforementioned Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, as the exclusive bargaining representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified by the Board as the representative of our employees.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 3127, United Brotherhood of Carpenters and Joiners of America, or any other labor organization, to refrain from joining or assisting Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority

or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them:

Alturi, Rose
Americo, Joan
Amoroso, Rose
Avalo, Jose
Bowerman, Jean
Boyd, James
Brender, Morris
Bruno, Angelo
Bryant, Edith
Ciccone, Frank
Cirillo, Joseph
Crawford, Katherine
Delbagno, Thelma
De Minno, Rose
De Turo, Michael
Diaz, Luis
Ebert, Joseph
Eskenazi, Morris

[fol. 498]

Castaldo, Louis
Capers, Flora
Cartagena, Luis
Cascione, Michael
Cheli, Gaetano
Gibson, Vernal
Golpe, Peter
Gonzales, Gloria
Greco, Bernard
Green, Evard
Harris, Joseph
Hernandez, Louis
Herzig, Edwin
Kennedy, Mary
Koiner, Connis
Libutti, Carmine
Maddalena, Lena
Maddalena, Lillie
Maresco, Ralph
Martin, Allen
Martone, Camille
Matera, Joseph
Messina, Agnes
Migliore, Anthony
Miller, James
Occhino, Mary
Oleszek, John
Flamio, Yolanda
Fonagy, Adelaide
Franchi, Fred
Gherardi, Dorothy
Paul, Henry
Pellay, Richard
Petrus, Elizabeth
Pieroni, Peter
Pollina, Charles
Prieto, Rafael
Radice, Antoinette
Rivera, Patricio
Sanchirico, William
Sandhop, William
Squillate, Frank
Saxton, John
Schultz, Henry
Shaw, Ruth
Sills, Estelle
Smith, Isiah
Smolen, Madeline
Tommarello, Frank
Tripolone, Slavatore
Unger, Alexander
Valentine, Michael
Vargas, Henry
Weinberg, Leopold

Olker, Marie
Pasculli, Jane
Pastore, Carmine
Zimmerspitz, Abraham
Zinzi, Michael

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named Local 3127, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

Mastro Plastics Corp.,

Dated ..... By .....
(Representative) (Title)

French-American Reeds Manufacturing Co. Inc.,
(Employer).

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

[fol. 499] SCHEDULE A OMITTED, PRINTED SIDE PAGE 472, ANTE

[fol. 500] [File endorsement omitted.]

[fol. 501] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 502] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

Mastro Plastics Corporation and French American Reeds Mfg Co., Inc., Petitioners,

vs.

National Labor Relations Board

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed November 12, 1954

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 27, 1954 (Nov. 27, 1954).

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 12th day of November, 1954.

[fol. 503] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 454

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

OCTOBER TERM, 1954

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BERNARD H. FITZPATRICK,
Counsel for Petitioners,
60 Wall Street,
New York 5, N. Y.

Parrish Press, Inc., 22 Thames St., New York 6, N. Y. U. S. A.

INDEX.

	PAGE
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	5
REASONS FOR GRANTING THE WRIT:	
A. As to the "Loss of Status" Question	11
B. As to the Breach of Contract Question	19
CONCLUSION	25
APPENDIX A. Decree Sought to be Reviewed	A-1
APPENDIX B. Opinions of Circuit Court of Appeals	B-1
APPENDIX C. Opinions of National Labor Relations Board	C-1

Cases.

	PAGE
Agwilines v. *N. L. R. B.*, 87 F. (2nd) 146	21
Auto Workers v. *Wisconsin Board*, 336 U. S. 245, 259	23
Elgin, Joliet & Eastern R. Co. v. *Burley*, 325 U. S. 711	19
Garner v. *I. B. T.*, 346 U. S. 483	24
Lion Oil Company case, 109 NLRB No. 106	16
Local No. 3, United Packinghouse Workers v. *NLRB*, 210 F. (2nd) 325, cert. den. Oct. 14, 1954, No. 124, ... U. S.	12, 14, 15, 16, 24
NLRB v. *McCatron, d. b. a. Privo Valley Lbr. Co.*, CA-9 (not yet officially reported), 26 Labor Cases. ¶68,740	13
NLRB v. *Sands Mfg. Co.*, 303 U. S. 332	23
Penello (NLRB) v. *Int. Union UMW*, 88 F. Supp. 935	12, 20
Transcontinental & Western Air v. *Koppal*, 345 U. S. 653	19
UAW v. *O'Brien*, 339 U. S. 454	14
U. S. v. *Int. Union, United Mine Workers*, 177 F. (2d) 129, cert. den. 338 U. S. 871	17
United Packinghouse Workers of America, CIO (Wilson & Company, Inc.), 89 NLRB 310	15
United Packinghouse Workers of America v. *Wilson & Co. Inc.*, 80 F. Supp. 563	15

Statutes.

National Labor Relations Act:	
Section 7	23
Section 8	18, 19
Section 8(d)	2, 6, 10, 12, 15, 16, 17
Section 9	18
Section 10	18, 19
Section 10(e)	11
Section 13	4, 22, 23

Supreme Court of the United States

OCTOBER TERM, 1954.

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Mastro Plastics Corporation and French-American Reeds Mfg. Co., Inc. respectfully pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered August 19, 1954 enforcing against your petitioners an order of the National Labor Relations Board dated March 13, 1953 insofar as the decree directs reinstatement with back pay of seventy-six alleged employees and of one Frank Ciccone.

Citations to Opinions Below.

The Intermediate Report of the Trial Examiner is unreported and is printed in "Appendix to Petitioners' Brief" in the Court of Appeals* at page 30. The prevailing opinion in the National Labor Relations Board is part

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* Hereinafter cited as "Board's Appendix" or "B. A."; this petitioners' appendix below will be cited as "P. A."

of its Decision and Order reported in 103 NLRB (No. 51) at page 511*; and is also printed in the record below at B. A. page 4. The opinion of the dissenting Board Members is at 103 NLRB 520 and is also printed in the record below at B. A. page 20. The opinion of the Court of Appeals printed in Record, p. 1047, hereto appears at 214 F. 2nd 462*; dissent at page 466. A petition for rehearing in that Court was denied without opinion.

Jurisdiction.

The undated decree of the Court of Appeals was entered on August 19, 1954, R., p. 1067, after denial of a petition for rehearing, R., p. 1058. The jurisdiction of this Court is invoked under 62 Stat. 928; 28 U. S. C. Section 1254(1).

Questions Presented.

1. Whether the "loss of status" provision of Section 8(d) of the National Labor Relations Act which bars from the remedial processes of the Act those employees who strike during the "cooling-off" period preceding termination of a collective contract is operative against unfair labor practice strikers.

2. Whether employees who strike against unfair labor practices during the term of a collective labor contract containing a covenant against "any strike" may be ordered reinstated.

Statutes Involved.

As to Question 1, the statutory provision involved is Section 8(d) of the National Labor Relations Act as

* For convenience the opinions of the Court of Appeals and the material portions of the Board's opinions have been reproduced as appendix hereto.

amended, 61 Stat. 136, 140; 29 U. S. C. §§151, 158(d). The text is:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

As to Question 2, the statutory provision involved is Section 13 of the National Labor Relations Act as amended, 61 Stat. 151, 29 U. S. C. §163. The text is:

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Statement.

Petitioning employers operate a plant in New York City at which there was in effect a collective-bargaining contract between them and Federal Labor Union No. 22045 A. F. of L. expiring November 30, 1950. The contract contained the following covenant:

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

In August of 1950, an organizational drive was undertaken by a Local 65 of the Wholesale and Warehouse Workers Union (B. A. 39) among petitioners' employees and that Union filed with the N. L. R. B. on September 28th a petition for certification. Petitioners admittedly opposed the organizational drive of Local 65 on the ground that it was communist-controlled but believed that the incumbent Local 22045 was too weak to cope with Local 65 (B. A. 39-40). Petitioners therefore got in touch with a third union, Local 318 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, a union which had previously defeated Local 65, and brought about a series of meetings between the officials of Locals 22045 and 318 wherein it was proposed that the bargaining agency of the unit be transferred from the incumbent to Local 318. The incumbent, 22045, ultimately rejected the proposals for a voluntary transfer of the bargaining agency (B. A. 79-80). Thereafter petitioners, it is found, commencing on Friday, October 20th and terminating during the week of October

23rd (B. A. 53-54) supported an organizational drive among the employees to displace Local 22045 as their bargaining agent and to substitute Local 318 by prompting certain employees to engage in such a campaign, soliciting others to engage therein, assisting in the campaign and paying certain employees for time devoted thereto (B. A. 80-82, 85). On October 24th, Local 318 intervened in the pending certification proceeding before the N. L. R. B. wherein Local 65 was the petitioner.

Meanwhile the incumbent Local 22045, which, somewhat prematurely in the light of contract provisions and statutory requirements, perhaps because of the activities of Local 65, had on September 7th, 1950 demanded a wage increase of 12½¢ per hour (B. A. 40), served the statutory notice of termination or modification on October 10th, 1950 (B. A. 14). Then on October 20th it increased its wage demand to 25¢ per hour and added a demand for a 3% welfare fund (B. A. 44). On October 23rd it adopted a resolution to transfer its affiliation to a fourth union, Local 3127 of the Carpenters Union, A. F. of L.* The stated reasons for the transfer were that Local 3127, which had the same business representatives as Local 22045 and shared its office (B. A. 39) was better equipped to administer the demanded welfare fund and could better resist the raiding of Local 318 because it had the support of the Carpenters International, A. F. of L. (B. A. 55).

The notice of the increased monetary demands and the welfare fund demand together with the advice that the members of Local 22045 had determined to switch their allegiance to Local 3127 were, it is found, communicated

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* The prevailing opinion in the Court of Appeals treated Local 22045, the incumbent bargaining agent and Local 3127 as a single entity. This tends to obscure the effect of the provisions of Section 8(d). At all times material, the certification proceeding of Local 65 was pending undetermined before the Board.

to petitioners at a conference of October 25th (B. A. 55). Incongruously, however, on October 31, Local 22045 appeared in the pending representation proceeding and declined to consent to an election, stating its intention to file unfair labor practice charges which it actually filed on November 2nd (B. A. 139).

Between October 23rd and November 10th, Local 3127 was soliciting employees to become members. One of the solicitors was the employee Ciccone, a machine shop man.

On the morning of Friday, November 10th, petitioners posted a notice to the effect that a rumor of a strike to be called the following Monday had reached them and warning employees that a strike would be treated as a breach of contract and cause for replacement (B. A. 57).

In the early afternoon of that day, November 10th, Petitioners' President, Maccaferri, leaving the plant to attend a directors meeting, had a conversation with Ciccone wherein, it is found, he accused the latter of soliciting membership for Local 3127 in the plant in the course of his duties, which were of roving character, and he ordered Ciccone to confine his work to the machine shop (B. A. 60). At 2:50 P. M. Ciccone, with some other machinists, left the machine shop and went to the molding room for the purpose of obtaining Coca Cola from the dispenser in that department. En route he, with the others, passed through the packing room. Mrs. Maccaferri, a supervisor in the packing room, reported by telephone to her husband, Petitioners' President, then at the directors meeting downtown that Ciccone was out of his department. Maccaferri called Ciccone's foreman and the Personnel Manager of the plant and ordered them to discharge Ciccone which they did forthwith (B. A. 61-63).

Within ten minutes of Ciccone's discharge, the other employees of the machine shop walked out on strike (B. A.

65). Ciccone and another machinist, Pieromi, shouted to an employee in the buffing room of the finishing department a request to join them on the picket line and the men in that department complied in a group (B. A. 66-67). The picket line was established by Saul, a representative of both Local 22045 and Local 3127, but under the auspices of the latter union. Some, but not all of the employees in the remaining departments, joined the picket line before the end of the day shift. On the following day, Saturday, November 11th, some employees reported for work across the picket line but thereafter there was a complete shut-down of the plant until December 11th.

Maccaferri's discharge of Ciccone was based, it is found, upon a mistake of fact. Ciccone was not prohibited by the order given him in the early afternoon, even as that order was construed by Maccaferri, from going to the Coca Cola dispenser (B. A. 88). Neither the Union nor Ciccone ever brought the discharge to arbitration however, despite the contract provision (B. A. 1013) providing for review of discharge on the issue of whether "proper cause" existed therefor. All who walked out or failed to return to work, it is found, did so to protest Ciccone's discharge or because they respected the picket line (B. A. 91-92). Saul, the representative of 22045 and 3127 stated on November 11th, the day after the strike began that the reinstatement of Ciccone was the only issue at that time (B. A. 74). No other issue was thereafter raised. The year previous, in negotiating the contract in force at the time of the strike Local 22045 had demanded but had not secured a change of the discharge review provision to the effect that the review should precede, rather than follow the discharge (P. A. 1016).

On December 11th, more than sixty days after service of the notice of modification or termination, the plant

reopened with a group of employees who then crossed the picket line and notice of discharge for breach of contract was sent to all employees who had failed to return to work. No arbitration was instituted upon these discharges. It was not until March 12, 1951 that the dischargees, about seventy in number, gave notice through Local 3127 that they offered unconditionally to return to work.

The contract (P. A. 1005) provided, *inter alia*, that

> "The Employers recognize and acknowledge the Union (Local 22045—counsel) as the sole collective bargaining agency for all of their employees, with respect to wages, hours, and conditions of employment."

Also that:

> "The Employers shall employ and retain in their employ * * * only employees in good standing with the Union, except for those jobs which are now exempt."

It also contained a clause requiring new employees to join the Union after the statutory grace period; provided for discharge of Union delinquents and, rather unusually, provided for arbitral determination of questions arising out of union membership. A checkoff clause was also included (P. A. 1005-1006) and in addition to the no-strike clause quoted in the forepart of this statement a clause reading as follows (P. A. 1006):

> "Either party may avail itself of the arbitration procedure as set forth in Section 19 (the arbitration clause—counsel) to obtain a determination of whether a strike, work stoppage, or lockout has occurred."

The arbitration clause (P. A. 1011) covered

> "* * * differences * * * between either of the Employers and the Union or its members as to the

meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach * * *."

The discipline and discharge clause read:

"The Employers shall have the sole right to discipline and discharge employees for proper cause, provided, however, that any disciplinary action or discharge may be subject to review in accordance with the procedure set forth in Section 19 (the arbitration clause—counsel), provided the matter is referred by the Union to the Employers within seven days of the date of discharge by the notice required in Section 19. In case of discharge, the Employers shall notify the Union within twenty-four (24) hours. The Employers may adopt such rules and regulations from time to time as they may deem necessary and proper for the carrying on of their businesses, provided the same are not inconsistent with any of the express provisions of this agreement. The term 'proper cause', as used in this section, shall include, but shall not be limited to, violation of any Employers' rule or regulation."

Petitioners declined to reinstate the discharged strikers and unfair labor practice charges were prosecuted by the Board. Petitioners raised two defenses, the only matters now in issue, viz., that the employees had lost their status as such by striking within the proscribed cooling off period and that their strike in breach of contract was an unprotected activity.

In respect of the "loss of status" defense the Board majority, overruling the defense, held (BA 14) that Section 8(d)

". . . applied to economic strikes and strikers rather than, as here, to an unfair labor practice strike

called and continued for issues apart from negotiation of a new or revised contract."

In respect of the breach of contract defense, the Board majority held that the strike was not a breach of the contract since it was in protest of

> "... matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the (petitioners)."

The prevailing opinion in the Court of Appeals sustained the Board on both points.

The jurisdiction of the Board to entertain the unfair labor practice charges rests upon the proven and conceded engagement of petitioners' plant in interstate commerce.

The Court of Appeals for the Second Circuit reviewed on petition by the National Labor Relations Board for enforcement under Section 10(e) of the National Labor Relations Act, the petitioners being engaged in business within that circuit (BA 1-3).

Reasons for Granting the Writ.

A. As to the "Loss of Status" Question.

The Congressional mandate underlying the "loss of status" question reads:

> "• • • Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute for the purposes of section • • • 8 • • • of this Act. • • •"

On its face the scope of the mandate is unambiguously universal and the strikers in the case at bar were squarely within the scope. The majority of the Board and of the Court below, however, would limit the universality of the language, so as to exclude the strikers herein. The language used in the prevailing opinions is, however, such that counsel cannot state the precise scope of the limitation, i. e. whether strikers are barred from claiming that they have been the victims of unfair labor practices only when they have frankly struck solely to secure a termination or modification of the contract or whether they are barred from claiming that they have been the victims of unfair labor practices in all cases other than those in which they have struck solely against unfair labor practices. There are many cases of strikes undertaken for purposes involving neither termination or modification nor unfair labor practices[1] and many strikes of mixed motivation.[2]

Qualitatively then, the importance of the question upon which review is sought appears to be that a Congressional mandate, in a matter not trivial, set out in unambiguous terms has been "amended by interpretation"[3] so as to

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[1] *Cf. Penello (NLRB)* v. *Int. Union UMW*, 88 F. Supp. 935, strike to reduce marketable stocks of coal, the contract containing a willing and able clause; Section 8(d) was held to be involved. In 1952 there were 403 "Recognition Strikes", 41 "Strengthening of Bargaining Position Strikes", 35 "Discrimination Strikes", 59 "Other Union Organization Strikes", 67 Sympathy Strikes", 79 "Union Rivalry or Factionalism Strikes", 181 "Jurisdictional Strikes", 3 "Union Regulation Strikes", and 4 "Other Interunion or Intraunion Strikes"; a total of 872 strikes not involving strict economic issues. The number of recorded strikes was 5,117. Monthly Labor Review, May 1953, Vol. 76, p. 508.

[2] In 1952, there were 240 strikes for commingled economic and organizational issues. The total of commingled and non-economic strikes would, hence, be 1,112, roughly 20% of the year's strike total of 5,117. Op. cit.

[3] *Local No. 3, United Packinghouse Workers* v. *NLRB*, 210 F. (2nd) 325, cert. den. Oct. 14, 1954, No. 124, ... U. S. .....

exclude one or more significant classes within the literal meaning of the mandate by opinions which leave in doubt the scope of the exclusions; this over the dissents of two *expertisse* adjudicators and one judge who joined in regarding the "amendment" as functionally destructive of the mandate.

Still examining the desirability of review from the qualitative side, it will be noted that the statutory language designating the strikes which will deprive a striker of his right to have an unfair labor practice charge prosecuted on his behalf is crisp and clear in the sense that it identifies the standard of conduct time-wise—a standard readily ascertainable by those expected to observe it. On the other hand the standard of conduct posed by the opinions below, even if univocal, is one presenting a host of imponderables, fact questions, law questions and credibility questions difficult enough for the employer to determine but hopelessly beyond the informational limitations,* the legal acumen and the general ability of those charged with observing the standard in the first instance—average employees—to determine. The latter standard is pregnant with the possibility of completely defeating the Congressional policy by the drumming up of non-contract strike issues, by the feeding of partial truths or other misinformation to employees—in short by the introduction of "ifs, ands and buts" into the otherwise simple equation that the average employee must solve. This consideration may not be a strong argument for reversal, but for a doctrine potentially destructive of Congressional policy by erosion to take root in the law without the prior scrutiny of this Court would

* For a case wherein employees struck in the honest but mistaken belief that a fellow-employee had been discharged for union activity see *NLRB* v. *McCatron, d. b. a. Privo Valley Lbr. Co.*, CA-9 (not yet officially reported), 26 Labor Cases ¶68,740.

seem to be a relinquishment of one of the most important functions of the Court.

Quantitatively also an authoritative resolution of the question is important. The risk of an employee in deciding whether to strike is, individually, a serious matter. Whether he can do so under the protections of the Act, as the Board contends in the instant circumstances or without the protections of the Act, as the literal mandate of Congress says, is a question of prime importance to him. No less serious is the determination of the employer; a choice between disrupting a going operation by reinstating in positions perhaps of superior grade and seniority employees antagonistic to the incumbents or of being amerced in substantial back pay without the benefit of the production normally represented by an outlay of wages. The number of employees under hazard of having to make such determinations runs into the millions.[1] The number of employers involved in strikes annually is in the thousands.[2] Their contractual relationships expire not once but recurrently, most often annually. The Act affirmatively contemplates that there shall be strikes.[3]

Moreover there is a conflict, at least in principle between the case at bar and the decision of the Eighth Circuit in *Local 3, United Packinghouse Workers.* v. *NLRB,* 210 F. (2nd) 325, cert. den. October 14, 1954, No. 124, U. S.

In the opinion below, the Second Circuit majority has this to say (p. 466):

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[1] In 1952, more than three and one-half million employees were involved in strikes. Monthly Labor Review, May 1953, Vol. 76, p. 508. Fifty-nine million man days were lost.

[2] In 1952 there were 5,117 recorded stoppages, some of them involving more than one employer. Op. cit. p. 508.

[3] *UAW* v. *O'Brien,* 339 U. S. 454.

> "In Local No. 3 etc. *v.* National Labor Relations Board, 8 Cir., 210 F. 2d 325, it was held that the employer had not been guilty of an unfair labor practice in the discharge of employees. It was, accordingly, not an unfair labor practice strike. Perhaps that serves to distinguish that case from this but, if not, we find ourselves in respectful disagreement."

The problem in the *Packinghouse* case was whether employees who engaged in a wage strike more than sixty days after service of the modification notice but before the expiration date of the contract lost their status as employees for the remedial purposes of the Act. The *Packinghouse* contract contained a wage reopening clause but lacked a "no strike" clause. The Board[1] held that the strikers did not lose status. To arrive at this result the Board narrowed the construction of Section 8(d) to "strikes designed to secure termination or modification of collective bargaining agreements," and argued that a construction which would, in effect, "write a no-strike clause into every contract" would be destructive of this purpose.

The Eighth Circuit flatly rejected this construction of the Section citing with approval the following language of the District Court in a companion case[2]:

> "Plaintiffs contend that their contract gave them the right to strike during its term. After the passage of the Labor Management Relations Act of 1947, such a contention would be contrary to the express policy of the Act and Section 8 thereof."

The Second Circuit, in the passage quoted from its opinion, seems to be uncertain whether the basis of its own

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[1] *Sub nom. United Packinghouse Workers of America, CIO* (Wilson & Company, Inc.), 89 NLRB 310.

[2] *United Packinghouse Workers of America* v. *Wilson & Co. Inc.*, 80 F. Supp. 563.

holding is merely that unfair labor practice strikes are without the ambit of Section 8(d) or whether it goes further to hold that no strike other than one limited to the attainment of contract changes during the final sixty days of its existence is within the ambit of Section 8(d). If it intends to hold the former then the conflict between the Circuits would appear to be a conflict in principle, since the rationale of its holding must still be that Section 8(d) is limited in its purpose. If the Second Circuit intends to hold the latter then there is, of course, a direct conflict.

It should be noted that in the case at bar the Board majority grounded its rejection of the "loss of status" defense squarely on the doctrine announced in the *Packinghouse* case,* holding to the narrower construction of Section 8(d) (B. A. 14).

No extended argument to demonstrate the error of the decision sought to be reviewed in this aspect will be undertaken. The dissenting opinion of Chairman Herzog and Member Murdock (B. A. 20) which was adopted by Judge Swan as his own dissent well establishes that there is a very substantial question of statutory construction involved.

However one point, no doubt appreciated by the dissenting Board members although they did not emphasize it, should be drawn to the attention of this Court. This point is that there exist sound reasons why Congress drew the loss of status provision so broadly as to apply to "any" striker and so broadly as to proscribe strikes on a temporal standard rather than by their objective.

Whatever one might think of some of the concepts of the Labor Management Relation Act of 1947, it was no ivory tower enactment; the legislators had before them the realties of the industrial world. One of these realities is

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* The Board later abandoned the doctrine in the *Lion Oil Company* case, 109 NLRB No. 106.

that the renewal time of a contract very often presents not the simple case of a single internally cohesive union versus a single employer. As a matter of fact, human nature, the general law of contract and the "contract bar" doctrine of the Board combine to concentrate in that very period the incidence of inter-union rivalry and intra-union friction. When such a situation occurs the stresses are not bilateral but multilateral. Were the stresses merely bilateral the legislator's problem would be almost completely solved by making the act of the incumbent union in breach of its contract an unfair labor practice as Section 8(d) has done, the only possible exception being the case of the feigned spontaneous or nominally unauthorized walkout. But, as noted, the legislative problem is deeper because other stresses have been superadded—the drive of the non-incumbent union, the tactics of its apostolic employees, the response of the incumbent and its supporters, the attempt of rival political factions within the incumbent to make capital of the nuances of the bargaining exchange, actions of all contestants designed to put the employer "on the spot" and the employer's reaction to such actions. These superadded stresses are not controlled by an enactment binding merely the employer and the incumbent to bargain without stoppage.

Congress had to go further to control these superadded stresses. It did so by providing a sanction—the "loss of status" clause—binding every employee and applicable on an exclusively temporal basis to the critical period. In this way it could prevent disruption by the adherents of the non-incumbent union and by those who would seek to wrest the hegemony of the incumbent from its existing leadership; in this way also it could solve the problem of the unprovably feigned "spontaneous" walkout.*

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* Illustrated by the strike involved in *U. S. v. Int. Union, United Mine Workers*, 177 F. (2d) 129, cert. den. 338 U. S. 871.

Thus considered, the universality and the temporal standard of the "loss of status" clause are no mere verbal accidents; they are deliberately chosen to accomplish a result functionally related to the duties laid upon the employer and the incumbent union and the purpose they serve is to protect the flanks of employer and incumbent while they discharge those duties and also to protect the legitimate contestant.* This purpose would be wholly aborted were the reasoning of the decree below allowed to stand.

The purpose is evident on the face of the "loss of status" provision. The inclusion of both Sections 8 and 10 in the sanction bespeaks the design of disqualifying terminal period strikers not only as to unfair labor practices committed against them subsequent to the loss of status—for which the mention of the substantive Section 8 alone would suffice—but also as to unfair labor practices antecedent to the loss of status which was accomplished by denying access to the enforcement machinery of the Act, Section 10. Had Section 8 alone been mentioned it would be possible to argue in the case of an antecedent unfair labor practice that the striker enjoyed the status of an employee when the unfair labor practice injured him, hence a subsequent strike would not disqualify him. There is no reason which counsel can imagine for the addition of Section 10 by Congress unless it was to block this very argument; for all unfair practices committed after a striker has lost status are obviously covered by the disqualification

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* Had the case at bar arisen in a slightly different framework this would be apparent. Suppose that in the representation proceeding Local 65, had raised the objection that the strikers had lost their status and objected to their voting on that ground; the strike would have put it at a disadvantage by interrupting its peaceful missionary efforts. Is not this why Congress made the loss of status provision applicable to Section 9 (representation) proceedings?

from the benefits of Section 8. Universality of the sanction was thus achieved by the addition of Section 10.

It is therefore submitted that an additional reason for the grant of certiorari exists viz., that the review involves a question important to the administration of the Act in the sense that insofar as Congress had a purpose in using broad language, that purpose cannot be achieved by the narrow construction (or constructions) adopted below.

B. As to the Breach of Contract Question.

The main reliance of Petitioners herein is, of course, placed upon the "loss of status" point. Nonetheless reasons exist why this Court should review the decision below in respect of the breach of contract defense.

Normally, the question of whether particular conduct violates specific contractual commitments is too ephemeral a question to justify review by this Court. But implications of the contract point in the case at bar transcend the limitations of the particular fact situation in such a way as to superimpose upon state law, in matters in which the states are sovereign, the camel's nose of a federal jurisprudence such as had grown up under *Swift* v. *Tyson*;[1] and this in the face of an expressly contrary Congressional intent.

The construction, effect and validity of collective contracts are, apart from matters expressly regulated by Federal law such as the identity of the agent and the scope of its authority,[2] matters of state cognizance.[3]

The opinion of the N. L. R. B. insofar as it dealt with the breach of contract defense professedly leaned upon an

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[1] 16 Pet. 1.

[2] *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711.

[3] *Transcontinental & Western Air* v. *Koppal*, 345 U. S. 653.

interpretation of the contract* between the parties and not upon a construction of N. L. R. A. (B. A. 11, note 8). But observe the following language which is the heart of the opinion (B. A. 10):

> "In the present situation the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents. . . . The November 10th strike was, as conclusively shown by the record, a protest against unfair labor practices apart from the terms, meaning and application of the contract and in no manner was an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees."

And the Court of Appeals uses the following language (A-5):

> "However, since the strike was caused and prolonged by the respondents unfair labor practice, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract. * * * The right of employees to strike in resistance to unfair labor practice by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition (citation). Unfair labor practices in violation of the Act were in no way covered by the contract. . . .

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* Curiously the general counsel of the Board had successfully contended that no contract could be drawn which would permit a strike within the terminal period; hence a contract containing the celebrated "willing and able" clause could not be interpreted to permit a strike. *Penello (NLRB)* v. *Int. Union UMW*, 88 F. Supp. 935. Situations of this character emphasize the importance of the resolution of the questions here presented to the administration of the Act.

One might reasonably inquire why, if the Board and the Court of Appeals are not construing the Act rather than the contract, is the notion of unfair labor practice—a purely statutory concept* not found in the laws of most states—always coupled in the language of the opinions with the notion of contractual non-coverage. Is this an accidental concurrence or a matter of significance?

To answer this question, let us examine the findings of fact of the Board, disregarding its legal conclusion that the facts constituted unfair labor practices, and compare them with the contract coverage. These findings as to pre-strike conduct of the employer are succinctly summarized by the Trial Examiner as follows (B. A. 85):

> (a) inducing and encouraging the representative of Local 22045 to agree to substitute Local 318 in its place and stead;
>
> (b) inducing and encouraging the representative of Local 318 to engage in a campaign to displace Local 22045 as the bargaining agent of their employees;
>
> (c) sponsoring, supporting and assisting the organizational campaign of Local 318;
>
> (d) giving financial rewards to employees active in the organizational campaign of Local 318;
>
> (e) inducing employees by threats, warnings of reprisal, and promises of benefit to become and remain members of Local 318 and to refrain from becoming or remaining members of other competing unions.

To these must be added the discharge of the employee Ciccone (B. A. 89).

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* *Aguilines* v. *N. L. R. B.*, 87 F. (2nd) 146.

But the subject matter of every one of these courses of conduct was dealt with in the contract! The recognition clause (quoted, *supra*, p. 9) excluded Local 318 from achieving recognition during the contract term, the union shop clause (quoted, *supra*, p. 9) prevented defections from the membership of Local 22045, the dues of Local 22045 were secured by checkoff and delinquency discharge clauses, membership status in Local 22045 was expressly made the subject of arbitration; whether there was proper cause for the Ciccone discharge was expressly made an arbitrable matter. Every finding was matter that involved the "meaning, interpretation, operation or application" of these clauses and "breach or threatened breach" of the recognition, union shop, checkoff and discharge clause, and even the claim, pressed unsuccessfully below, that the conduct of the employer constituted a constructive lockout was expressly made arbitrable (clause quoted, *supra*, p. 10).

It is thus abundantly clear that what has been done below is that petitioner's conduct has been adjudged not by applying the standards of contractual language and state law—which might or might not embrace the concept of unfair labor practices—but by applying the standard of whether the conduct breached the Federal Act. This is why the opinions, despite the disclaimer,[1] find it necessary to link the ideas of unfair labor practices and contractual noncoverage in an unbreakable couple.[2]

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[1] The ingenious disclaimer (B. A. 11, note 8) overlooks the recognition, union shop and discharge clauses.

[2] Half of the Board members voting on the issue (Murdock abstained) hold a no-strike clause inapplicable, in any event, to an unfair labor practice strike. (Houston, Styles.) The language of the Court of Appeals dealing with Section 13, though obscure, may reflect this view. This view, if it does not completely ignore Section 13, apparently regards the amendment as having "cancelled out" the Section.

Congress has, however, by Section 13 of the Act prescribed precisely the contrary. The Act, even before its amendment, did not

> ". . . purport to modify the body of law as to the legality of strikes . . ."[1]

and, since the amendment, it may not be construed to

> ". . . affect the limitations or qualifications on that right."

If this means anything at all,[2] it means that the scope of a limitation placed upon strikes by contract[3] cannot be adjudged by the Act nor by the statutory concept of unfair labor practices of Sections 7 and 8 of the Act. In determining the coverage of a contractual limitation the finding of unfair labor practices is not only irrelevant, but incompetent, and a conclusion based on that finding is error.

There is a fourfold reason why an error of this character should be reviewed by this Court. Firstly, it poses a problem of negotiation to the multitude of union negotiators and their management counterparts who annually sit down to negotiate contract changes and to their counsel who must draft[4] the outcome of the negotiations. This problem is deeper than might superficially appear for while most employers would not hesitate to contract to refrain from

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[1] *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 259.

[2] As (and if) counsel understands the Board's position (B. A. 12) the amendment rendered the section meaningless.

[3] Contractual limitations were contemplated in the amendment, the committee reports citing *NLRB* v. *Sands Mfg. Co.*, 303 U. S. 332, as an example of that type of limitation.

[4] Ironically, reading the Board's National Electric Products decision, 80 N. L. R. B. 995, as the Board explains it in the case at bar (B. A. 9-10), the employer who affirmatively contracts to commit an unfair labor practice fares better than the employer whose contract is lawful.

engaging in unfair labor practices, few of them would be willing to have their employees "adjudicate" the issues by striking. The assurance of freedom from business interruption is almost the only consideration and is normally the most important consideration running to the employer in a collective contract.[1] The question is therefore important to the administration of the Act.

Moreover, there is underlying the issue the very basic question of whether the law governing collective contracts in this aspect is the law of the state concerned or whether it is Federal law. Unfair labor practices, even when recognized by states, vary from state to state and from the Federal concept. The Federal Law, for example, recognizes union unfair labor practices, but the New York Law, presumably applicable to the instant contract, does not.

And if the criterion of unfair labor practices is to be applied to contract law, in what manner is a court in a damage action or a specific performance suit to adjudicate the issue in the face of the *Garner*[2] doctrine?

Finally, if the criterion be Federal, is the contract to be construed single mindedly regarding the rights of employees under a single section of the Act or *in favorem pacis* as the Act as a whole might imply.

It is respectfully submitted that the implications of the holding below are so far reaching and affect so many persons and involve such basic features of Federal jurisprudence that review by this Court is warranted.

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[1] A point discussed in the *Packinghouse* case, *Local No. 3 United Packinghouse Workers* v. *NLRB*, 210 F. (2d) 325, cert. den. Oct. 14, 1954, No. 124.

[2] *Garner* v. *I. B. T.*, 346 U. S. 483.

Conclusion.

The writ should run with respect to both questions presented.

Respectfully submitted,

BERNARD H. FITZPATRICK,
Counsel for Petitioners,
60 Wall Street,
New York 5, N. Y.

Dated New York, N. Y.
November 15, 1954.

APPENDIX A

Decree Sought to be Reviewed.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD, Petitioner, *v.* MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC., Respondents.	No. 22905

Decree Enforcing An Order of the National Labor Relations Board.

Before:

CHASE, Chief Judge; SWAN & FRANK, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 13, 1953. The Court heard argument of respective counsel on April 8, 1954 and has considered the briefs and the transcript of record filed in this cause. On July 16, 1954, the Court, being fully advised in the premises, handed down its decision enforcing the said order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondents Mastro Plastics Corp. and French American Reeds Manufacturing Co., Inc., New York City, their respective agents, successors, and assigns, shall:

Decree Sought to be Reviewed.

1. Cease and desist from:

(a) Discouraging membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, or in any other labor organization of their employees, and encouraging membership in Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or in any other labor organization of their employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Discharging or discriminatorily refusing to reinstate or reemploy employees for the reason that they engaged in strike or concerted activities protected by the National Labor Relations Act, as amended (hereinafter referred to as the Act),

(c) Sponsoring, or rendering assistance and support to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or to any other labor organization, to become collective bargaining agent of their employees;

(d) In any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 3127, United Brotherhood of Carpenters and Joiners of America, or any other labor organizations, to refrain from joining or assisting Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

Decree Sought to be Reviewed.

(a) Offer Frank Ciccone and the employees named in Schedule A full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole Frank Ciccone and the employees named in Schedule A for any loss of pay they may have suffered by reason of the Respondents' discrimination against them, in the manner described in the Remedy section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated June 11, 1952, as amended in the Board's decision and order dated March 13, 1953;

(b) Withhold all recognition from Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers as the exclusive bargaining representative of their employees for the purpose of dealing with the Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said Local 318 shall have been certified by the Board as the representative of such employees;

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for a determination of the amounts of back pay due and the rights of employment accruing under the terms of this Decree;

(d) Post at their plant copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director, of the National Labor Relations Board for the Second Region, New York, New York, shall, after being duly signed by the Respondents' authorized representatives, be posted by the Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

ship in the charging union, encouraged membership in Local 318, and interfered with, restrained, and coerced Respondents' employees in the exercise of the rights guaranteed in Section 7 of the Act.

4. We also find, in agreement with the Trial Examiner, that the work stoppage of November 10, was a strike, rather than a lockout, but that it was clearly caused and prolonged by the cumulative effects of the Respondents' unfair labor practices culminating in the discriminatory discharge of Ciccone. The Respondents, however, strongly urge in their exceptions that the Trial Examiner was in error in finding that this strike constituted concerted activity which was protected by the Act. They make this contention on the basis of two affirmative defenses, both of which were found without merit by the Trial Examiner.

The Respondents first contend that the strike was an action in breach of contract and therefore cannot be held to be protected activity. The contract in existence between the Respondents and Local 22045, American Federation of Labor,[4] during the period of time pertinent here, contained a clause stating that:

> "The Union agrees that during the term of this agreement, there shall me no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

This contract did not expire until November 30, 1950, and the Respondents argue that the strike of November 10, taking place as it did during the term of this contractual pledge, breached the contract and is therefore not entitled

[4] The incumbent union at the Respondents' plant in the period in question. As related by the Trial Examiner, the membership of Local 22045 took steps shortly before the strike to transfer affiliation to the charging union.

Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps the Respondents have taken to comply herewith.

/s/ HARRIE B. CHASE
Judge, United States Court of Appeals for the Second Circuit

Filed:

/s/ JEROME N. FRANK
Judge, United States Court of Appeals for the Second Circuit

Decree Sought to be Reviewed.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, or in any other labor organization of our employees, or encourage membership in LOCAL 318, INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment, or any terms or conditions of employment.

WE WILL NOT discharge or discriminatorily refuse to reinstate or reemploy any of our employees for engaging in strike or concerted activities protected by the Act.

WE WILL NOT recognize the aforementioned LOCAL 318, INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS, as the exclusive bargaining representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified by the Board as the representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, or any other labor organization, to refrain from joining or assisting LOCAL 318, INTERNATIONAL BROTHERHOOD OF

to the protection of the Act under the *Scullin-Dyson* doctrine.[5] The Trial Examiner found on the contrary that the contract did not indicate an intention by either party to waive the usual right of self-help to correct abuses "unrelated to the actual operation of the contract or the normal relationship of the parties but arising, as in this case, from a wilful and serious violation of law designed to destroy the very foundation of that contract and that relationship". He further found that, as an equitable matter, the Respondents should not be allowed to assert, as a defense, a strike which was caused by their own wilful, deliberate, widespread and grave unfair labor practices.

The Board, under the *Scullin-Dyson* doctrine, has held that economic strikes in violation of no-strike contract clauses are not protected activity. In both the *Scullin* and *Dyson* cases, however, the Board noted the absence of any prior breach of contract or unfair labor practices on the part of the employer. In *National Electric Products*,[6] the doctrine was applied despite the fact that the strike stemmed from an action of the employer found to be in violation of the Act. In that case, the discharge of an employee for dual union activity was requested by the incumbent union and the employer acquiesced under the terms of the union-shop provisions of the parties' contract. The same contract contained a no-strike pledge but a strike was conducted by the employees at the plant in protest against the discharge. The discharge was found by the Board to be in violation of the Act under the *Rutland Court* rule[7] but the strikers were held to be engaged in unprotected activity because of the no-strike pledge. The Board majority held:

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[5] *Scullin Steel Company*, 65 NLRB 1294; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445.

[6] 80 NLRB 995. *Chairman Herzog* concurred specially in the decision, with *Board Member Houston* dissenting.

[7] *Rutland Court Owners*, 44 NLRB 587, 46 NLRB 1040, subsequently overruled by the Supreme Court in *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U. S. 355.

> "The right to strike, although protected by the Act, *may be waived by the employees in an agreement concluded through the collective bargaining process.* • • • As we have heretofore emphasized, 'no-strike' clauses • • • are designed to forestall the use of even permissive economic weapons and to substitute settlement by collective bargaining, and tend to realize the purposes of the Act by encouraging the practice and procedure of collective bargaining rather than resort to industrial warfare". (emphasis supplied)

We do not consider that the *National Electric Products* case furnishes authority or rationale for sustaining the Respondents' defense here. The essential differences between the facts of the cases are patent. In the earlier case, the discharge which instigated the strike was an action required by and in accord with the contract between the representative of the employees and their employer. In the present situation, the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents. In the *National Electric Products* case, the employees waived their right to strike action as to matters settled and agreed upon in the contract. In the instant case, we can perceive no rational or legal basis on which to assume that the employees contemplated or, in fact, executed a waiver of self-help under the conditions imposed by the Respondents which gave rise to the strike of November 10. The contract itself provides for arbitration, rather than strike or lockout economic pressure, to settle "differences • • • between either of the Employers and the Union or its members as to the meaning and application of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." The November 10 strike was, as conclusively shown by the record, a protest against unfair labor practices apart from the terms, meaning and appli-

Decree Sought to be Reviewed.

PULP, SULPHITE AND PAPER MILL WORKERS, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them:

Alturi, Rose
Americo, Joan
Amoroso, Rose
Avalo, Jose
Bowerman, Jean
Boyd, James
Brender, Morris
Bruno, Angelo
Bryant, Edith
Castaldo, Louis
Capers, Flora
Cartagena, Luis
Cascione, Michael
Cheli, Gaetano
Ciccone, Frank
Cirillo, Joseph
Crawford, Katherine
Delbagno, Thelma
De Minno, Rose
De Turo, Michael
Diaz, Luis
Ebert, Joseph
Eskenazi, Morris
Gibson, Vernal
Golpe, Peter
Gonzales, Gloria
Greco, Bernard
Green, Evard
Harris, Joseph
Hernandez, Louis
Herzig, Edwin
Kennedy, Mary
Koiner, Connis
Libutti, Carmine
Maddalena, Lena
Maddalena, Lillie
Maresco, Ralph
Martin, Allen
Martone, Camille
Matera, Joseph
Messina, Agnes
Migliore, Anthony
Miller, James
Occhino, Mary
Oleszek, John
Olker, Marie
Pasculli, Jane
Pastore, Carmine

cation of the contract and in no manner was an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees.

On the entire record, we find that the no-strike clause of the contract between the Respondents and Local 22045 did not contemplate or incorporate a waiver of strike action on the part of the employees under the circumstances present on November 10.[8] Accordingly, we find no merit in the contention of the Respondents that the strike of that date was in breach of contract and was activity unprotected by the Act.[9]

The Respondents also contend, as an affirmative defense, that the strike was in violation of the terms of Section 8 (d) of the Act and that, as a result, the participants lost their employee status under the mandate of that section. The Board Members, otherwise unanimous, divide on this issue.

The Trial Examiner rejected this defense on the ground that Section 8 (d) was not applicable to an unfair labor

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[8] The Board also finds no merit in the Respondents' contention that Section 13 of the Act prevents the Board from overruling the breach of contract defense. Section 13, discussed more fully hereafter with regard to the Respondents' second affirmative defense, enjoins constructions *of the statute* which "affect" limitations on the right to strike. It is sufficient to note, in this regard, that it is not the Act or any part thereof which has been construed herein to limit the no-strike clause, relied upon by the Respondents, but the terms and scope of that clause itself.

[9] *Chairman Herzog*, although dissenting as to the disposition made of the second defense raised by the Respondents, concurs in the finding that the strike herein was not in breach of contract. The *Chairman*, like the Trial Examiner, calls attention to the rationale contained in his concurring opinion at page 1002 of the 1949 *National Electric Products* decision. *Member Peterson* joins in this rationale.

Member Murdock reserves opinion on the breach of contract issue which it is unnecessary for him to reach in view of his dissenting conclusion that Section 8 (d) deprived the strikers, in any event, of the status of employees protected by the Act.

Members Houston and Styles, while concurring in the finding that this particular contract no-strike clause did not contemplate a waiver of self-help under the conditions present herein, would further find that a no-strike clause is inapplicable where a strike is caused by the unfair labor practices of the employer.

Flamio, Yolanda	Saxton, John
Fonagy, Adelaide	Schultz, Henry
Franchi, Fred	Shaw, Ruth
Gherardi, Dorothy	Sills, Estelle
Paul, Henry	Smith, Isiah
Pellay, Richard	Smolen, Madeline
Petrus, Elizabeth	Tommarello, Frank
Pieroni, Peter	Tripolone, Salvatore
Pollina, Charles	Unger, Alexander
Prieto, Rafael	Valentine, Michael
Radice, Antoinette	Vargas, Henry
Rivera, Patricio	Weinberg, Leopold
Sanchirice, William	Zimmerspitz, Abraham
Sandhop, William	Zinzi, Michael
Squillate, Frank	

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named Local 3127, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act.

Mastro Plastics Corp.

By .....
(Representative) (Title)

Dated.....

French-American Reeds Manufacturing Co., Inc.

.....
(Employer)

By .....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

practice strike not called or continued in order to force modification of a contract. The Respondents except to this ruling on two grounds. First, they assert that Section 13 of the Act prohibits the Board from construing the Act and Section 8 (d) so as to affect limitations on the right to strike. Secondly, they dispute the conclusion of the Trial Examiner on the ground that Congress clearly intended to prohibit all strikes, economic or unfair labor practice, during the 60 day period specified in the statute.

The lack of merit in the first of the Respondents' arguments on this issue is inherent in the language of Section 13, itself. That Section provides that:

> "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as to interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right".

Section 13, it is therefore clear, prohibits constructions of the statute affecting limitations on the right to strike. It also, however, prohibits constructions which "interfere with or impede or diminish in any way" the right to strike except as *specifically* provided for in the Act. This two-edged approach of the section is as much a legal barrier, therefore, to a Board construction broadcasting the scope of Section 8 (d), if the limitation on strikes in that section is clearly to apply only to strikes to force contract action, as it is to restricting the limitations on strikes in that section if Section 8 (d) is clearly to apply to any strike. It is apparent, accordingly, that the issue must be resolved by the terms of Section 8 (d) alone.

Section 8 (d) provides, in part,

> "That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively, shall also mean that no party to such contract shall terminate

Decree Sought to be Reviewed.

Schedule A

Alturi, Rose
Americo, Joan
Amoroso, Rose
Avalo, Jose
Bowerman, Jean
Boyd, James
Brender, Morris
Bruno, Angelo
Bryant, Edith
Capers, Flora
Cartagena, Luis
Cascione, Michael
Castaldo, Louis
Cheli, Gaetano
Cirillo, Joseph
Crawford, Katherine
Delbagno, Thelma
De Minno, Rose
De Turo, Michael
Diaz, Luis
Ebert, Joseph
Eskenazi, Morris
Flamio, Yolanda
Fonagy, Adelaide
Franchi, Fred
Gherardi, Dorothy
Gibson, Vernal
Golpe, Peter
Gonzalez, Gloria
Greco, Bernard
Green, Evard
Harris, Joseph
Hernandez, Louis
Herzig, Edwin
Kennedy, Mary
Koiner, Connis
Libutti, Carmine
Maddalena, Lena
Maddalena, Lillie
Maresco, Ralph
Martin, Allen
Matera, Joseph
Messina, Agnes
Migliore, Anthony
Miller, James
Occhino, Mary
Oleszek, John
Olker, Marie
Martone, Camille
Pasculli, Jane
Pastore, Carmine
Paul, Henry
Pellay, Richard
Petrus, Elizabeth
Pieroni, Peter
Pollina, Charles
Prieto, Rafael
Radice, Antoinette
Rivera, Patricio
Sanchirice, William
Sandhop, William
Squillate, Frank
Saxton, John
Schultz, Henry
Shaw, Ruth
Sills, Estelle
Smith, Isiah
Smolen, Madeline
Tommarello, Frank
Tripolone, Salvatore
Unger, Alexander
Valentine, Michael
Vargas, Henry
Weinberg, Leopold
Zimmerspitz, Abraham
Zinzi, Michael

APPENDIX B

Opinions of Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 190—OCTOBER TERM, 1953.

(Argued April 8, 1954 Decided July 16, 1954.)

Docket No. 22905

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

MASTRO PLASTICS CORP., and FRENCH-AMERICAN REEDS MFG. CO., INC.,

Respondents.

Before:

CHASE, Chief Judge, SWAN and FRANK, Circuit Judges.

Petition for enforcement of an order of the National Labor Relations Board. Order enforced.

GEORGE J. BOTT, General Counsel,
DAVID P. FINDLING, Associate General Counsel,
A. NORMAN SOMERS, Assistant General Counsel,
BERNARD DUNAU,
HARVEY B. DIAMOND,
Attorneys,
National Labor Relations Board, Petitioner.

BUTLER, BENNETT & FITZPATRICK, Attorneys for Respondents, Bernard H. Fitzpatrick, of Counsel.

cation is to become effective before such terms and conditions can be reopened under the provisions of the contract. *Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended*, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (emphasis supplied)

The contract herein, between Local 22045 and the Respondents, expired on November 30, 1950. The formal notice of an intent to modify the contract was not served on the Respondents by Local 22045 until October 10. It is the Respondents' contention, therefore, that as the strike admittedly took place less than 60 days after the notice was tendered, the strikers lost their status as employees. As noted, the Trial Examiner rejected this argument finding that Section 8 (d), viewed in its entirety, applied to economic strikes and strikers rather than, as here, to an unfair labor practice strike called and continued for issues apart from negotiation of a new or revised contract.

The Board has previously construed Section 8 (d) as having the "prime purpose" of preventing "so-called 'quickie' strikes designed to secure termination or modification of collective bargaining agreements".[10] Moreover, in the recent *Thayer* case,[11] where the section was also posed as a defense in an unfair labor practice strike situation, the Board indicated clearly that it considered the

[10] *United Packinghouse Workers of America, CIO (Wilson & Company, Inc.)*, 89 NLRB 310, which concerned another, different problem arising from the enforcement and administration of the section.

[11] *H. N. Thayer Company, et al.*, 99 NLRB No. 165, where the Board grounded its rejection of a Section 8 (d) defense on the specific facts of the case, where the striking union was never recognized as the representative of the employees and thus was not a party to the contract subject to the restrictions of Section 8 (d).

CHASE, Chief Judge:

Local 3127, United Brotherhood of Carpenters and Joiners of America, the bargaining agent for respondents' employees, filed charges against Mastro Plastics Corp., and French-American Reeds Manufacturing Company, Inc., two New York corporations which, though separate corporate entities with separate payrolls, are under the same management, have the same employees and use the same plant. The charges, as amended, were that the respondents had engaged in unfair labor practices in violation of Section 8(a)(1), (2) and (3) of the Labor-Management Relations Act, 1047, 29 U. S. C. A. §141 *et seq.* The substance of them was that the respondents by various unlawful means aided Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, in attempting to become bargaining agent for the respondents' employees during a time when they were represented by Local 3127; that an employee, one Frank Ciccone, was discriminatorily discharged because of his membership in, and activities on behalf of, Local 3127, and because of his refusal to join Local 318; that 76 other employees were unlawfully locked out or discharged for the same reasons; and that applications for reinstatement by these employees were rejected. The relief sought was a cease and desist order and reinstatement of the discharged employees with back pay.

Respondents' answer admitted the discharge of Ciccone and the other 76 employees, but denied allegations of unfair labor practices. For affirmative defenses, it was alleged that Ciccone was discharged for violating the instructions of his superiors and that the employment of the remaining 76 employees was lawfully terminated because they went on strike in violation of a collective bargaining contract and of Section 8(d) of the Act.

Hearings were held before a trial examiner in New York in March, 1952; findings sustaining the charges were made

ambit of Section 8 (d) to be limited in scope to the contract modification or termination area. There we held that

> . . . . by its terms [Section 8 (d)] applies only to strikes to terminate or to secure a modification or interpretation of a collective bargaining contract. The finding that the present strike was an unfair labor practice strike therefore takes the strike itself outside the purview of Sec. 8 (d)"[12].

While it is true that the Board did not find it necessary to base its rejection of the Section 8 (d) contention in that case upon the ground quoted, we find no reason to reject the reasoning expressed therein. Although the Respondents and our dissenting colleagues contend that the Congress intended that all strikes, economic or unfair labor practice alike, should be covered by the prohibition in that section, we fail to discern any such intention expressed by proponents of the legislation when it was enacted in 1947. The section itself, as we have pointed out, is unmistakeably designed to control and deal with a distinct facet of labor-management relationships, *i. e.*, the critical period of collective bargaining negotiations preceding the termination or modification of a contract. The Congressional concern and intent, as reiterated many times during consideration of the section in 1947, was to prevent the use of economic pressures such as strikes and lock-outs for reasons connected with contract negotiation from impending or disrupting collective bargaining during that critical period.[12] In short, the Congress prohibited either labor

[12] See, for example, the statement of Senator Ball, a proponent of the 1947 amendments including Section 8 (d). He stated, in defining the objectives of the latter: "The provision in the National Labor Relations Act defining collective bargaining, and providing where a contract between a union and an employer is in existence, fulfilling the obligation on both sides to protect (sic) [bargain] collectively means giving at least 60 days' notice of the termination of the contract, or of the desire for any change in it, is another provision aimed primarily at protecting the public, as well as the

except as to the alleged lockout; and it was recommended that the affirmative defenses, which were established in point of fact, be held legally insufficient. On review the Board adopted the findings, conclusions and recommendations of the examiner, with one exception not relevant here, and the respondents were ordered, two members of the Board dissenting, to cease and desist from their unfair labor practices and to reinstate with back pay Frank Ciccone and the other 76 employees named. The unfair labor practices are no longer contested and the only part of the Board's order which is in contention is that requiring reinstatement of employees with back pay.

The facts are set forth in 100 N. L. R. B. No. 51, and only a brief resume of them is now needed. Since 1948, when Local 3127[1] was certified by the New York State Labor Relations Board, it has been the bargaining agent for the respondents' employees. In August of 1950, Local 65 of the Wholesale and Warehouse Workers Union, which was regarded by the respondents as being communist dominated, started organizational activities among the employees. To combat Local 65 the respondents sought to replace Local 3127 with Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, the latter being a much stronger union, and from the middle of September until November 20, 1950, the respondents committed rather flagrant unfair labor practices to achieve that end. Local 318 was encouraged, sponsored, and actively assisted by the respondents in signing up the employees; some employees were rewarded for aiding Local 318; and the respondents' officers and supervisors made promises of benefit and threats of reprisal related to membership in

[1] Also involved in dispute with the respondents was Federal Labor Union, Local 22045. But, as Local 22045 and Local 3127 were represented by the same persons, used common offices, and as the representation rights of respondents' employees were at various times shifted by them between the two unions, we shall refer to them jointly as Local 3127.

the rival unions. These activities culminated, on November 10, 1950, in the discharge of employee Frank Ciccone because of his activities on behalf of Local 3127 and his opposition to Local 318. His discharge precipitated a strike which, by the following day, involved all of the respondents' employees, and which lasted until March 9, 1951, when application for reinstatement of striking employees was made and denied as to Ciccone and the seventy-six who have been ordered reinstated with back pay.

About three months prior to the applications for reinstatement, on December 11, 1950, some of the respondents' employees returned to work and a form letter was sent to all employees remaining on strike notifying them that their employment had been terminated by reason of their striking in violation of the collective bargaining contract. The contract provision upon which the respondents relied reads as follows:

> 5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.

As "the term of this agreement" did not expire until November 30, 1950, the strike did occur during the term and so it is contended that the strikers, by breaking the contract, lost the right to reinstatement.

However, since the strike was caused and prolonged by the respondents' unfair labor practices, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract. That clause must be interpreted in the light of the entire contract of which it is an integral part, not as an isolated waiver unrelated to the rest of the agreement, and the inhibition it imposes is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out

of the normal relations of the parties. Instances of strikes to enforce changes in contract provisions which violate a no-strike clause, of which *Scullin-Steel Company*, 65 N. L. R. B. 1294; and *Joseph Dyson & Sons, Inc.*, 72 N. L. R. B. 445, are examples, should be distinguished. The right of employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition. See *National Electric Products Corporation*, 80 N. L. R. B. 995. Unfair labor practices in violation of the Act were in no way covered by the contract, nor did the contract provide means for combating them or settling disputes arising because of them. And, of course, the respondents' unlawful activities cannot be considered part of the normal relations of the parties.

The respondents also argue that, even if the no-strike clause was not a waiver of the right to strike as to matters outside the contract, it was violated because the strike was caused by the discharge of Ciccone, which was an arbitrable matter under the contract, and that the strike was continued for the sole purpose of securing Ciccone's reinstatement. Were this assertion accurate as to the cause of the strike and its continuation we would agree. However, the Board found that the strike was caused and prolonged solely by the respondents' violations of the Act. Ciccone's discharge was regarded by the Board, and by the trial examiner, as the spark which set off the strike, not as the essential cause of it, and the evidence amply supports this conclusion.

The main contention by the respondents is that their affirmative defense based on Section 8(d) of the Act, 29 U. S. C. A. 158(d), should have been sustained. On October 10, 1950, Local 3127 notified the respondents in the required manner of their desire to negotiate for the modification of the existing collective bargaining contract. This brought into operation Section 8(d), which provides that

contracts may not be modified except under certain circumstances; the party seeking modification must serve notice on the other party sixty days prior to the time of the proposed modification, there must be an offer to meet and confer for purposes of negotiation, mediation agencies must be notified, and the existing contract must be continued in full force and effect during the sixty day period following notification, without resort to strike or lock-out. It is further provided in subdivison (d)(4) that "Any employee who engages in a strike within sixty-day period * * * shall lose his status as an employee * * * for the purpose of sections 8-10 of this Act * * * "

If the word "strike" in the just mentioned subdivision is to be read as meaning "any strike" however caused and regardless of its objectives, all of the strikers ceased to be employees when they went on strike and none were entitled to reinstatement.

The Board has found by adopting the trial examiner's findings which were based upon ample evidence that the strike was caused solely by the unfair labor practices of the respondents and was not motivated by any purpose so to obtain any economic advantage by way of contract modification. And so the question is squarely presented as to whether the statutory deprivation of employee status applies to strikers whose sole purpose is to protest against unlawful conduct on the part of the employer and to remedy unfair labor practices which constitute such conduct.

In order to arrive at the true meaning of the word "strike" as used in this subsection, its relation to the purpose of the subsection as a whole must be given due consideration. Though some statutes may be so simple in language and purpose that when all the words are read literally and inclusively the exact meaning clearly appears, often that is not so and it isn't in this instance. As usually must be done in interpreting a statute, all of its provisions should be read in the light of the legislative purpose and with reference to each other. *United States* v. *Boisdore's Heirs*, 8 How. 113; *Duparquet Co.* v. *Evans*, 297 U. S. 216.

Section 8(d)(4) of the Act deals with the obligation to bargain collectivgly in good faith and particularly with the termination or modification of existing bargaining contracts. After making provision for procedures looking toward the attainment of such ends, which contain conditions applicable both to employer and employees, a sanction is imposed upon employees as a coercive measure to prevent their use of the strike either to obtain or to prevent the termination or modification of a collective bargaining contract. The "sixty-day period" is a special period during which the *status quo ante* is to be maintained in respect to employer-employee relationships while the statutory method for bargaining as to existing contracts set up in the subdivision is being used; and a "strike within the sixty day period" means a strike in interference with the use of that method. In other words, it is tied to the method by the modifying words "within the sixty-day period" and that tie limits the sanction Congress imposed upon the employees involved in the use of the statutory method and excludes strikes which are still protected activities because they are unconnected with the use of the method. Were this not so, we would have to attribute to Congress the intent not merely to provide for an orderly way to terminate or modify existing collective bargaining agreements but the intent both to give an employer, by taking advantage of the method, an opportunity to indulge in unfair labor practices which employees would, perhaps, find it too hazardous to resist quickly and effectively by means of a strike, and to require employees, who used the method, to do so on pain of giving the employer just such an opportunity. It would discriminate, in respect to the right to resist unfair labor practices by striking, between employees working under a collective bargaining contract and those who were not and between unions who were satisfied with such existing contracts and those who were not. And it would penalize the latter for attempting lawfully to remedy their condition by peaceful bargaining. In view of the well known purpose of the Act to prevent industrial strife, such an

intent should not be attributed to Congress until, and unless, it sees fit to say so in clear and uncertain terms.

It has been said that the provision in Section 13 that, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications upon that right" requires a conclusion opposite to that reached. That, of course, is not so unless we are wrong in holding that there is no limitation upon the right to participate in an unfair labor practice strike. In so far as here relevant, it presupposes a limitation and has no significance as to whether there is one. In *Local No. 3 etc.* v. *National Labor Relations Board,* 8 Cir., 210 F. 2d 325, it was held that the employer had not been guilty of an unfair labor practice in the discharge of employees. It was, accordingly, not an unfair labor practice strike. Perhaps that serves to distinguish that case from this but, if not, we find ourselves in respectful disagreement.

A motion by the respondents to reopen the proceedings for the introduction of additional evidence as to the meaning of the no strike clause in the contract was made before the Board and denied. A motion has been made here to remand to the Board for that purpose pursuant to Section 10(e) of the Act. Apparently the movants had an opportunity to adduce such evidence at the hearings and failed to avail themselves of it. At least we are not satisfied by the showing here made that there are reasonable grounds for their failure to present such evidence at those hearings and the motion is denied.

Order enforced.

SWAN, Circuit Judge, dissenting in part:

For the reasons well stated in the opinion of the dissenting members of the Board, I would deny enforcement of the reinstatement provisions of the order.

APPENDIX C.

Opinions of National Labor Relations Board.

Decision and Order.

103 NLRB No. 51 D-7020
New York, N. Y.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter

of

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

and

LOCAL 3127, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

Case No. 2-CA-1799.

On June 11, 1952, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report together with supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error

was committed.[1] The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:[2]

---

[1] During the course of the hearing, the Board denied the Respondents leave to appeal several rulings of the Trial Examiner on the ground that the issues could best be resolved on the basis of a full record. The Respondents moved to strike all allegations of the complaint which concerned the strike at the Respondents' plant and the strikers on the ground that the employee status of the strikers had become a representation matter. During the strike at the Respondents' plant, the Board issued a Decision and Direction of Election, Case No. 2-RC-3170, January 29, 1951, not reported in printed volumes of Board decisions. The petition in that case was filed by the charging union herein. The Direction contained the proviso that strikers and replacements could vote under challenge and was later amended to defer the election until "such time as the Regional Director deemed appropriate" because of the filing of the charges in the instant case. The Respondents contend, in their motions to strike, that the Board was without power to refer issues concerning the strikers to a Trial Examiner and that the Trial Examiner was without jurisdiction to hear evidence on such issues because Section 9 (c) of the Act provides that representation matters should be heard by an officer or agent of the Board who can make no recommendations. The Trial Examiner denied the motions based on this argument and his ruling is hereby affirmed. Cf. *Times Square Stores Corporation*, 79 NLRB 361.

[2] The following minor corrections of the Trial Examiner's findings are noted. (1) While the Union's notice of intent to terminate or modify the contract was dated September 29, 1950, it was not delivered to the Employer until October 10; (2) The evidence clearly shows, as found by the Trial Examiner and adopted by the Board, that Maccaferri feared that Local 22045 was not strong enough to cope with the organizational efforts of Local 65 the Wholesale and Warehouse Workers rather than, as inadvertently noted at one point in the Intermediate Report the efforts of Local 318 of the Paper Mill Workers; and (3) The Trial Examiner, having found and concluded correctly that the Respondents had unlawfully assisted and supported Local 318, inadvertently stated, under the heading "Concluding findings" that the Respondents thereby violated Section 8 (a) (3) of the Act by such conduct rather than Section (a) (2). None of these inaccuracies or inadvertencies in the Trial Examiner's Report is of such a nature as to affect his ultimate conclusion, or our concurrence therein.

Opinions of National Labor Relations Board.

1. The Board finds, as did the Trial Examiner, that the Respondents engaged in extensive interference, restraint, and coercion of their employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby violated Section 8 (a) (1) of the Act.

2. The Board finds, as did the Trial Examiner, that the Respondents rendered unlawful support and assistance to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, and thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act. The General Counsel excepts to the failure of the Trial Examiner to recommend that the Respondents withhold recognition from Local 318 unless and until such time as it might be certified by the Board as the bargaining representative of Respondents' employees. In view of the nature and extent of the Respondents' support and assistance as shown by the record, we find merit in the exception. Accordingly, in order to restore the status quo and to free the employees from this restraint upon their freedom to achieve self-organization, we shall order that the Respondents withhold all recognition from Local 318 as the representative of their employees for the purpose of dealing with the Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until it is certified by the Board as such representative.[3]

3. We further find, in accord with the Trial Examiner, that the Respondents discriminatorily discharged, and thereafter refused to reinstate, Frank Ciccone because of his organizational activities in support of the charging union. It is clear that this discharge and refusal to reinstate, motivated by Respondents' support of Local 318 and its animus toward rival organizations, constituted a discriminatory action with regard to Ciccone's hire and tenure of employment which thereby discouraged member-

[3] See *Julian Freirich Co., et al.*, 86 NLRB 542.

or modify such contract; unless the party desiring such termination or modification

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;*

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modifi-

or management from using strike or lock-out pressures in the frame of contract negotiations in preference to peaceful bargaining devices. To adopt the view of our dissenting colleagues would be to find that Congress intended, despite this clear concern and attention throughout the section to contract negotiation, to render a labor organization helpless for a set period against unfair labor practices totally unconnected with the problems of contract termination or modification. This view we cannot ascribe to Congress in the absence of any expressed legislative intent or desire.

Accordingly, we find that Section 8 (d) did not deprive the strikers at Respondents' plant of their employees status. In accord with the Trial Examiner, we further find that by discharging the employees listed in Schedule A, attached hereto, on December 11, 1950, and thereafter refusing to reinstate said employees following unconditional application for reinstatement made on their behalf, the Respondents violated Section 8 (a) (1) and 8 (a) (3) of the amended Act. Like the Trial Examiner, we shall therefore order the Respondents to offer to the employees listed on Schedule A, together with Frank Ciccone, full reinstatement to their former or substantially equivalent positions as set forth in the Intermediate Report under the heading "The remedy". We note, however, that while the application for reinstatement was made on March 9, 1951, it was not received by the Respondents until March 12. Accordingly, back pay for employees listed in Schedule A shall be assessed from March 12 rather than the earlier date.

* * * * * *

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employee, who have been the victims of 'quickie' strikes. I do not think that is taking away the rights of labor or of unions either one; it is simply saying that they should all follow the sound, fair, and sane procedure which a majority of the good ones now follow." (Congressional Record, 80th Congress, May 12, 1947, p. 5146.)

PAUL M. HERZOG, CHAIRMAN, and ABE MURDOCK, MEMBER, dissenting in part only:

While we find, in agreement with our colleagues, that the Respondents clearly committed violations of Section 8 (a) (1), 8 (a) (2), and 8 (a) (3) of the Act, we are unable to join in the conclusion of the majority opinion that the strike of November 30 was protected activity. It is our considered belief that the strike on that day was in contravention of the explicit mandate of Section 8 (d) of the present Act and that the strikers, as a result, lost the status of employees protected by the statute.

Section 8 (d), as noted in the majority opinion, directs that contracts shall not be modified or terminated unless certain specified conditions are met. Among those conditions are provisions for a 60-day notice prior to the date of the desired modification or termination, and for notification to mediation agencies of the existence of a dispute. As our colleagues of the majority admit, Congress in enacting the provisions of Section 8 (d) was concerned with the problem of industrial unrest that often arises when collective bargaining contracts are in process of revision or termination. There is no question but that Congress concluded that labor-management relationships could be stabilized by enforcing certain specified rules to govern and control the parties' actions during these periods of stress and possible conflict. The provision was accordingly added that resort to the economic weapons of strike and lockout was forbidden to both employers and employees during the 60-day period following notice of intent to terminate or modify a contract. The prohibition was then emphasized, although only insofar as employees are concerned, by the additional sanction of loss of employee status for workers who engaged in strikes during that period.

There is no question here but that the strike of November 30 was called and conducted before the expiration of the 60-day period following the Unions notification to the

Respondents that it wished to revise the contract then about to terminate. We agree with our colleagues' finding that the strike was one caused and precipitated by the Respondents' unfair labor practices. The instant case thus poses the question whether Section 8 (d) permits the Board any discretion to differentiate between types and classes of strikes according to their motivation, or to apply the sanction of the statute to some, but not all, strikes. We believe the answer must be in the negative.

The language used in Section 8 (d) does not distinguish as to what types of strikes or lockouts are prohibited during the 60-day period. The instruction to labor, management and this Board is short and explicit. The parties must continue the provisions of the contract in full force and effect during this period "without resorting to *strike or lockout:*" Any employee "who engages in a *strike*" within the 60 days shall lose his status as an employee. No limitation or qualification, express or implied, appears in the text to indicate a Congressional intent to limit the sanction to "economic strikes" and to allow freedom of action to those striking in response to unfair labor practices. The coverage is clear and all inclusive. If, as urged by the majority, the Congress did intend to limit the scope of the prohibition to economic strikes or, at most, to strikes within the frame of contract negotiation, the section is barren of any supporting indication. On the contrary, we consider that this very failure to incorporate any such qualifying language, when it might easily have been added, underlines the fact that the clear intent of the section was to prohibit all work stoppages during this period.

Section 8 (d) being plain and unambiguous in this respect, there is no need to resort to legislative history to plumb its meaning.[14] The Congressional hearings and debates which accompanied its enactment, if considered, however, make the majority opinion interpretation of the

[14] *N. L. R. B.* v. *Dant & Russell, Limited*, 73 S. Ct. 375.

section even more untenable. The opponents of the Taft-Hartley revisions of the Wagner Act in 1947, on numerous occasions noted and emphasized the broad coverage of Section 8 (d). Thus, the Senate Minority Report stated:[15]

> "Moreover, the section is silent as to the Board's authority to accommodate conflicting issues such as provocation on the part of the employer. Under this section an employer desirous of ridding himself either of the employees or their representative can engage in the most provocative conduct without fear of redress except by way of a lengthy hearing before the Board and a subsequent admonition to thereafter 'cease and desist' from such practices. In striking contrast to the relatively delicate treatment provided for such action by an employer, *employees unwilling idly to countenance abuse, who resort to self-help under the circumstances, are removed from the protection of the statute and lose 'employee status.'* An employer is at liberty under such circumstances freely to replace any employee bold enough to insist upon justice. *The provision denies to the Board the exercise of any discretion to accommodate the equitable doctrine of 'clean hands'. The provisions of the section are conclusive—the employee is subject to summary dismissal irrespective of the employer's conduct.*" (emphasis supplied)

To this, as to other statements of the same tenor, no denial was made by the proponents of the legislation. The Senate Majority Report,[16] indeed, reiterated that "any employee who engaged in a strike during the 60 day period [specified in Section 8 (d)] would lose any rights under Section 8, 9, and 10 of the Wagner Act, unless and until he is reem-

[15] Senate Minority Report No. 105 page 2 on S. 1126, 80th Congress.

[16] Senate Report, No. 105 on S. 1126, 80th Congress.

ployed." Even apart from the clear import of the statement, its reference to the loss of rights under Section 8 would be pointless unless Section 8 (d) was clearly to include unfair labor practice strikes with all other strikes among the prohibited conduct.

It is true that the Board has, on prior occasion, referred to the "prime purpose" of Section 8 (d) as being to eliminate "quickie strikes." However, the fact that such strikes, presumptively economic, were the prime object of the statute, cannot diminish the broad wording of the section or the wider area of action which it also was intended to govern. Nor is the *dictum* of the *Thayer*[17] case, which admittedly was decided on a totally different ground, controlling. While the result of the application of Section 8 (d) in the instant case may indeed appear inequitable in the light of the extensive unfair labor practices committed by the Respondents, such equitable considerations are not within our power to apply. To us, the conclusion is inescapable that Congress determined in 1947 that the cause of industrial peace would best be served by total elimination of the use of economic weapons, no matter what the provocation, during the critical period of contract renegotiation. As this determination was made a part of the statute in Section 8 (d), it is not the province or the prerogative of this Board to question or to alter it.

Accordingly, as the strike of November 10 was called and conducted before the end of the 60-day period specified by the statute, we must find that it was not protected concerted activity and that the strikers lost the status of employees entitled to reinstatement.

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[17] H. N. Thayer Company, 99 NLRB No. 165.

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Supreme Court of the United States

OCTOBER TERM, 1954.

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	5
Summary of Argument:	
A. The loss of status question	13
B. The contract question	15
Argument:	
I. Employees who strike during the renegotiation period of a contract lose status for the enforcement purposes of NLRB even though they are unfair labor practice strikers	18
II. Employees are bound by an unlimited no-strike clause even though they strike to protest unfair labor practices where the conduct of the employer relates to matters expressed in the contract: a no-strike clause is to be construed to favor industrial peace	38
Conclusion	49
Appendix: Abstracts from Conference Committee Report on LMRA 1947	51

Table of Cases.

	PAGE
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261	33
Assoc. of Westinghouse Salaried Employees v. *Westinghouse Elec. Corp.*, 348 U. S. 437	43
Assoc. Flour Haulers v. *Sullivan*, 168 Misc. 315, 5 N. Y. S. 2d 982	47
Colgate-Palmolive-Peet Co. v. *N. L. R. B.*, 338 U. S. 355	37
Dameron v. *Brodhead*, 345 U. S. 322	36
Matter of Western Union Telegraph Co. (A. C. A.), 299 N. Y. 17	16, 34
McMurray v. *Brown*, 91 U. S. 257	21
Monsieur Henri Wines Ltd., 44 NLRB 1310	34
National Electric Products decision, 80 N. L. R. B. 995	41
Nederlandsch Amerikaansche Stoomvaart Maatschappij v. *Stevedores' & Longshoremen's Benev. Soc.*, 265 F. 397 (D. C. E. D. La. 1920)	36
NLRB v. *Barrett Co.*, 135 F. (2nd) 959	26
NLRB v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 42	33, 35
NLRB v. *McCatron, d. b. a. Privo Valley Lbr. Co.*, CA-9 216 F. (2d) 212; cert. den. 348 U. S. 943	33
NLRB v. *Remington Rand, Inc.*, 94 F. (2nd) 862	26, 34
N. L. R. B. v. *Rockaway News Supply*, 345 U. S. 71	44, 47
NLRB v. *Sands Mfg. Co.*, 303 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682	17, 47
Penello (NLRB) v. *UMW*, 88 F. Supp. 935	17, 48
The National Silver case, 71 NLRB (No. 87) 594	24, 31
Thompson Products, 72 NLRB 150	27

PAGE

U. S. v. *Int. Union, United Mine Workers*, 177 F. (2nd) 129, cert. den. 338 U. S. 871 29

Unexcelled Chemical Corp. v. *U. S.*, 345 U. S. 59 36

Virginian Ry. v. *System Fed. No. 40*, 300 U. S. 515, 545 33

Wallace Corp. v. *NLRB*, 323 U. S. 248 34

Weber v. *Anheuser-Busch*, 348 U. S. 468 22

STATUTES.

National Labor Relations Act as Amended, 61 Stat. 136, 140, etc. 2

Section 8(d) 2, 12, 18, 19, 24, 25, 27, 32, 36, 40

Section 9 ..... 2, 13, 19, 24, 32, 37

Section 10 ..... 2, 19, 25, 32

Section 13 ..... 4, 16, 40, 42, 45

Section 8(d)(4) 14, 27, 36, 37

Section 8(a)(5) 34

Section 8(b)(3) 34

Labor Management Relations Act of 1947 (61 Stat., Title V).

Section 501(2) 4, 13, 21

Section 502 4

AUTHORITIES.

Monthly Labor Review, May 1947, Vol. 64, No. 5, p. 795 28

Labor Disputes and Collective Bargaining §89, Vol I, p. 263 45

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BRIEF FOR PETITIONERS.

Opinions Below.

The Intermediate Report of the Trial Examiner is unreported and is printed in the Record at page 266. The prevailing opinion in the National Labor Relations Board is part of its Decision and Order reported in 103 NLRB (No. 51) at page 511 and is also printed in the Record at page 339. The opinion of the dissenting Board Members is at 103 NLRB 520 and is also printed in the Record at page 353. The opinion of the Court of Appeals printed in Record, p. 363, is reported at 214 F. 2nd 462; dissent at page 466. A petition for rehearing in that Court was denied without opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under 62 Stat. 928; 28 U. S. C. Section 1254(1). The undated decree of the Court of Appeals was entered on August 19, 1954 (R. 373), after denial of a petition for rehearing (R. 370). By order of Mr. Justice Clark (R. 377) time for filing petition for a writ of certiorari was extended to November 27, 1954. Petition for the writ was filed November 19th, 1954 and granted January 10, 1955 (R. 377). 348 U. S. 910.

Questions Presented.

1. Whether the "loss of status" provision of Section 8(d) of the National Labor Relations Act, which bars employees who strike during the "cooling-off" period following the giving of notice of intent to terminate or modify a collective contract from representation proceedings (Sec. 9) from protection against subsequent unfair labor practices (Sec. 8) and from relief thereafter against unfair labor practices through the enforcement machinery of the Board (Sec. 10), is operative against unfair labor practice strikers.

2. Whether employees who strike against unfair labor practices during the term of a collective labor contract containing a covenant against "any strike", may be ordered reinstated.

Statutes Involved.

As to Question 1, the statutory provision involved is Section 8(d) of the National Labor Relations Act as amended, 61 Stat. 136, 140; 29 U. S. C. §§151, 158(d). The text is:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation

of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

As to Question 2, the statutory provision involved is Section 13 of the National Labor Relations Act as amended, 61 Stat. 151, 29 U. S. C. §163. The text is:

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Collaterally involved as to both questions are two sections definitive of the term "strike" in the amending Act, the Labor Management Relations Act of 1947 (61 Stat. Title V, Section 501(2), 502; 29 U. S. C. Sec. 142 (2), 143). The texts, so far as material are:

SECTION 501. DEFINITIONS

"When used in this chapter—(2) The term 'strike' includes any strike or other concerted stop-

page of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

SECTION 502. SAVING PROVISIONS

"* * * nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

Statement.

Petitioning employers operate a plant in New York City at which there was in effect a collective-bargaining contract between them and Federal Labor Union No. 22045 A. F. of L. expiring November 30, 1950 (R. 253). The contract contained the following covenant (R. 255):

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

In August of 1950, an organizational drive was undertaken by a Local 65 of the Wholesale and Warehouse Workers Union (R. 274) among petitioners' employees and that Union filed with the N. L. R. B. on September 28th a petition for certification. Petitioners admittedly opposed the organizational drive of Local 65 on the ground that it was communist-controlled but believed that the incumbent Local 22045 was too weak to cope with Local 65 (R. 274).

Petitioners therefore got in touch with a third union, Local 318 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, a union which had previously defeated Local 65 (R. 274), and brought about a series of meetings between the officials of Locals 22045 and 318 wherein it was proposed that the bargaining agency of the unit be transferred from the incumbent to Local 318 (R. 275). The incumbent, 22045, ultimately rejected the proposals for a voluntary transfer of the bargaining agency (R. 276). Thereafter petitioners, it is found, commencing on Friday, October 20th and terminating during the week of October 23rd (R. 278-286) supported an organizational drive among the employees to displace Local 22045 as their bargaining agent and to substitute Local 318 by prompting certain employees to engage in such a campaign, soliciting others to engage therein, assisting in the campaign and paying certain employees for time devoted thereto. On October 24th, Local 318 intervened in the pending certification proceeding before the N. L. R. B. wherein Local 65 was the petitioner (R. 285).

Meanwhile the incumbent Local 22045, which, somewhat prematurely in the light of contract provisions and statutory requirements, perhaps because of the activities of Local 65, had on September 7th, 1950 demanded a wage increase of 12½¢ per hour (R. 275), served the statutory notice of termination or modification on October 10th, 1950 (R. 340). Then on October 20th it increased its wage demand to 25¢ per hour and added a demand for a 3% welfare fund (R. 277). On October 23rd it adopted a resolution to transfer its affiliation to a fourth union, Local 3127 of the Carpenters Union, A. F. of L.* The stated reasons for the transfer

* The prevailing opinion in the Court of Appeals treated Local 22045, the incumbent bargaining agent and Local 3127 as a single entity.

were that Local 3127, which had the same business representatives as Local 22045 and shared its office (R. 271) was better equipped to administer the demanded welfare fund and could better resist the raiding of Local 318 because it had the support of the Carpenters International, A. F. of L. (R. 287).

The notice of the increased monetary demands and the welfare fund demand together with the advice that the members of Local 22045 had determined to switch their allegiance to Local 3127 were, it is found, communicated to petitioners at a conference of October 25th (R. 288). Incongruously, however, on October 31, Local 22045 appeared in the pending representation proceeding and declined to consent to an election, stating its intention to file unfair labor practice charges which it actually filed on November 2nd (R. 288).

Between October 23rd and November 10th, Local 3127 was soliciting employees to become members. One of the solicitors was the employee Ciccone, a machine shop man (R. 290).

On the morning of Friday, November 10th, petitioners posted a notice to the effect that a rumor of a strike to be called the following Monday had reached them and warning employees that a strike would be treated as a breach of contract and cause for replacement (R. 289).

In the early afternoon of that day, November 10th, Petitioners' President, Maccaferri, leaving the plant to attend a directors meeting, (R. 294) had a conversation with Ciccone wherein, it is found, he accused the latter of soliciting membership for Local 3127 in the plant in the course of his duties, which were of roving character, and he ordered Ciccone to confine his work to the machine shop (R. 292). At 2:50 P. M. Ciccone, with some other machinists, left the machine shop and went to the molding room for the purpose of obtaining Coca Cola from the dispenser

in that department. En route he, with the others passed through the packing room. Mrs. Maccaferri, a supervisor in the packing room, reported by telephone to her husband, Petitioners' President, then at the directors meeting downtown, that Ciccone was out of his department. Maccaferri called Ciccone's foreman and the Personnel Manager of the plant and ordered them to discharge Ciccone which they did forthwith (R. 293-295).

Within ten minutes of Ciccone's discharge, the other employees of the machine shop walked out on strike (R. 295). Ciccone and another machinist, Pieroni, shouted to an employee in the buffing room of the finishing department a request to join them on the picket line and the men in that department complied in a group (R. 298). The picket line was established by Saul, a representative of both Local 22045 and Local 3127, but under the auspices of the latter union (R. 297). Some, but not all of the employees in the remaining departments, joined the picket line before the end of the day shift (R. 297, 299). On the following day, Saturday, November 11th, some employees reported for work across the picket line but thereafter there was a complete shutdown of the plant until December 11th (R. 304).

Maccaferri's discharge of Ciccone was based, it is found, upon a mistake of fact (R. 316). Ciccone was not prohibited by the order given him in the early afternoon, even as that order was construed by Maccaferri, from going to the Coca Cola dispenser. Neither the Union nor Ciccone ever brought the discharge to arbitration however (R. 305), despite the contract provision (R. 261) providing for review of discharge on the issue of whether "proper cause" existed therefor. All who walked out or failed to return to work, it is found, did so to protest Ciccone's discharge or because they respected the picket line (R. 318). Saul, the representative of 22045 and 3127 stated on November

11th, the day after the strike began, that the reinstatement of Ciccone was the only issue at that time (R. 304). No other issue was thereafter raised.

The demands which Local 22045-3127 was, at the time of the strike, negotiating included a proposal for a change in the discharge review provision of the existing contract to the effect that arbitral review of the cause for discharge should precede rather than follow the discharge (R. 265, Exh. 3 Demand 2, in evid. R. 74).

During this entire period, from September 28th to the last week in December (R. 306), the petition of Local 65 was pending undetermined before the Board.

On December 11th, more than sixty days after service of the notice of modification or termination, the plant reopened with a group of employees who then crossed the picket line and notice of discharge for breach of contract was sent to all employees who had failed to return to work (R. 305-306). No arbitration was instituted upon those discharges. It was not until March 12, 1951 that the dischargees, about seventy in number, gave notice through Local 3127 that they offered unconditionally to return to work (R. 350, corr. R. 307).

The contract (R. 253 254) provided, *inter alia*, that

> "The Employers recognize and acknowledge the Union (Local 22045—counsel) as the sole collective bargaining agency for all of their employees, with respect to wages, hours, and conditions of employment."

Also that:

> "The Employers shall employ and retain in their employ * * * only employees in good standing with the Union, except for those jobs which are now exempt."

It also contained a clause requiring new employees to join the Union after the statutory grace period (R. 254); provided for discharge of Union delinquents and, rather unusually, provided for arbitral determination of questions arising out of union membership. A checkoff clause was also included (R. 254, 255) and in addition to the no-strike clause quoted in the forepart of this statement a clause reading as follows (R. 255):

> "Either party may avail itself of the arbitration procedure as set forth in Section 19 (the arbitration clause—counsel) to obtain a determination of whether a strike, work stoppage, or lockout has occurred."

The arbitration clause (R. 259) covered

> "* * * differences * * * between either of the Employers and the Union or its members as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach * * *."

The discipline and discharge clause (R. 261) read:

> "The Employers shall have the sole right to discipline and discharge employees for proper cause, provided, however, that any disciplinary action or discharge may be subject to review in accordance with the procedure set forth in Section 19 (the arbitration clause—counsel), provided the matter is referred by the Union to the Employers within seven days of the date of discharge by the notice required in Section 19. In case of discharge, the Employers shall notify the Union within twenty-four (24) hours. The Employers may adopt such rules and regulations from time to time as they may deem necessary and proper for the carrying on of their businesses, pro-

vided the same are not inconsistent with any of the express provisions of this agreement. The term 'proper cause', as used in this section, shall include, but shall not be limited to, violation of any Employers' rule or regulation."

Petitioners declined to reinstate the discharged strikers and unfair labor practice charges were prosecuted by the Board. Petitioners raised two defenses, the only matters now in issue, viz., that the employees had lost their status as such by striking within the proscribed "cooling-off" period and that their strike in breach of contract was an unprotected activity.

In respect of the "loss of status" defense the Board majority, overruling the defense, held (R. 348) that Section 8(d)

> ". . . applied to economic strikes and strikers rather than, as here, to an unfair labor practice strike called and continued for issues apart from negotiation of a new or revised contract."

In respect of the breach of contract defense, the Board majority held that the strike was not a breach of the contract since it was in protest of (R. 344)

> ". . . matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the (petitioners)."

The "matters which constituted serious violations of the Act" were, the Board found (R. 340, adopting R. 313):

> (a) inducing and encouraging the representatives of Local 22045 to agree to substitute Local 318 in its place and stead;
>
> (b) inducing and encouraging the representatives of Local 318 to engage in a campagin to displace

Local 22045 as the bargaining agent of (petitioners') employees;

(c) sponsoring, supporting and assisting the organizational campaign of Local 318;

(d) giving financial rewards to employees active in the organizational campaign of Local 318;

(e) inducing employees by threats, warnings of reprisal and promises of benefits to become and remain members of Local 318 and to refrain from becoming or remaining members of other competing unions;

and also (R. 316)

". . . discharging Frank Ciccone on November 10, 1950. . . ."

The prevailing opinion in the Court of Appeals (R. 364) sustained the Board on both points.

The order of the Board, in addition to the usual cease and desist provisions, provided for the reinstatement of Ciccone and seventy-eight strikers. The reinstatement provisions of the order, as enforced by the decree below, are the provisions assailed upon this writ.

The jurisdiction of the Board to entertain the unfair labor practice charges rests upon the proven and conceded engagement of petitioners' plant in interstate commerce (R. 269, 270). It is to be noted, however, that the "loss of status" defense goes to the jurisdiction of the Board, which fact may have a bearing on the authority of a reviewing court.

The Court of Appeals for the Second Circuit reviewed on petition by the National Labor Relations Board for enforcement under Section 10(e) of the National Labor Relations Act, the petitioners being engaged in business within that circuit (R. 269).

Summary of Argument.

A. The Loss of Status Question.

There is no ambiguity in the loss of status clause. It sets up a temporal standard of conduct and its coverage of employees is universal. Its language reveals that it was drawn with an eye to the definition of "employee" in Section 2(3) which definition expressly comprehends the victims of unfair labor practices. The word "strike" in the clause is defined in Section 501 LMRA, to be a universal concept. If Congress meant the loss of status clause to be limited, it made at least three distinct language "errors". This is improbable; the concurrence of broad terms is intentional and bespeaks a cessation of industrial strife whatever its source.

The language of the loss of status clause is selective. It leaves the striker with his rights under Section 7 which must be respected negatively in other tribunals. Its only effect is to bar the striker from access to NLRB remedies until re-employment; it gives the employee an election between the strike remedy and the Board remedies but does not penalize him further.

The inclusion of Section 9 in the loss of status indicates a design to restrain strikes concerned with representation issues, particularly the recognition strike, which the Conference Committee expressly condemned (Report, Appendix 52). Congress intended that at least some unfair labor practice strikers were to be denied the right to vote, for it struck out of the proposed legislation a clause permitting them to vote (Rep't Appendix 59).

The inclusion of Section 8, the unfair labor practice Section, in the loss of status presupposes that the striker would be the victim of an unfair labor practice; the inclu-

sion of Section 10, the procedural Section, presupposes that unfair labor practices had been committed against him prior to the strike. There is nothing to indicate a distinction between the unfair labor practice connected with the strike and any other; such a distinction would be illusory in practice. If such a distinction can be made, the loss of status clause would be superfluous, for Congress had clearly, in Section 8(d)(4) made the strike of an incumbent agent to change working conditions an unfair practice and recognized that employees supporting such efforts would lose status completely; it struck out as superfluous proposed provisions accomplishing a loss of status in the case of those who struck in support of unfair labor practices (Conf. Rep't, Appendix 55). The loss of status clause was left in the Act because it accomplished a broader purpose than the rejected clauses.

Congress realized that the stresses of renegotiation are not merely bi-lateral but multi-lateral, embracing the employer, the incumbent union, the rival union, the dissidents within the incumbent union. Congress had to protect those who followed its prescribed processes for orderly resolution of renegotiation problems from disruptive tactics by any of the other interests. It consequently adopted the device of excluding from those processes those whose strike rendered the processes unworkable, whatever their objective or excuse for striking. This is reasonable, for if the strike, by its success, proves to be an efficacious remedy the striker loses nothing; but if it fails the striker chose the inefficacious remedy and thereby disrupted the orderly remedy; he may not later resort to the peaceable remedy which he first rejected as inefficacious.

The language of the loss of status clause is unambigious, deliberately chosen, consonant with the legislative history and functionally correlated to the objective of peaceful contract renegotiation.

The opinions below are based on the argument that since Section 8(d) is concerned only with contract renegotiation, the loss of status clause is limited to strikes to terminate or modify a contract. It involves the obvious fallacy that only negotiation strikes interfere with negotiation. Labor Board Cases 301 U. S. 1, 42. That Congress found it necessary to deal with the individual employee as such indicates that it recognized him to be a problem separate from the problem of the incumbent union and with interests not always coincident with those of the incumbent.

The argument below, narrowing the term "employee" to one who strikes for economic changes in the renegotiation period implies that an employee may strike for economic changes at any other time, an implication at variance with the obvious intent of Section 8(d) as a whole. The loss of status clause is meaningful only if it refers to strikes permissible at any other time.

There is no repugnancy between the loss of status clause and the remainder of Section 8(d); rather they are organically related if the loss of status clause is read literally. As read by the Board and the Court below the clause is superfluous.

B. The Contract Question.

The contract contained a "no-strike" clause unlimited on its face and unambiguous.

The Board, construing the no-strike clause as limited in its application to matters specifically foreclosed in the writing and stating that the strike was "a protest against unfair labor practices apart from the terms, meaning and application of the contract" holds that even the unlimited "no-strike" clause did not make the strike a breach of the contract.

The character of the employer's acts as unfair labor practices is irrelevant to a determination of the coverage of a no-strike clause, for Section 13 provides that the Act shall not be construed to affect any limitation or qualification placed upon the right to strike. The six acts of the employer found by the Board may be summed up as aiding a union, Local 318, rival to the incumbent Local 22045 in an effort to displace the latter. One of the acts was the discharge of an employee.

An examination of the contract shows that the status of the incumbent was secured by specific provisions. The recognition clause protected Local 22045 against substitution of Local 318; union shop terms prevented membership defections; checkoff and delinquency discharge provisions protected the dues of Local 22045. Whether there was proper cause for the discharge was reviewable by arbitration. The acts charged against the employer which, cumulatively, caused the strike were, thus, items specifically covered by the contract terms. The Board's conclusion, then, falls on its own premise and its own findings. It is evident that the Board reached its conclusion as to contract coverage not by applying the standard of contract language but by applying the standard of whether the conduct breached the Act. The latter is contrary to Section 13.

The Board erred also in narrowing the scope of the no-strike clause to matters specifically foreclosed by the contract. If the law of New York be applicable as such, or as Federal law adopted by Congress, the controlling decision is *Matter of Western Union Tel. Co. (A. C. A.)*, 299 N. Y. 177 wherein it was held that a refusal to work, for reasons apart from the remaining terms of the contract, specifically, for the purpose of aiding fellow unionists in a strike in which the Western Union employees had no direct interest, violated an unlimited no strike clause.

If Federal law be applicable there appears to be no controlling decision. However it is clear from Section 13 that, in contract construction, the character of conduct as an unfair labor practice can play no part. The Board used the canon that a clause in derogation of the right to strike will be strictly construed. Such a canon is at variance with the major purpose of the Act which seeks to protect the flow of commerce free of strike interruptions by obtaining consensual derogation of the right to strike. The canon of construction then should be that the whole right to strike is yielded except as expressly or by fair implication reserved. Labor agreements are no longer purely private contracts; they are instruments of commerce to be construed *in favorem pacis* in the public interest. *NLRB* v. *Sands Mfg. Co.*, 303 U. S. 332 implies a canon of construction requiring express reservation to preserve the right to strike.

The Board's construction leads to the absurd result that demands withdrawn in bargaining and hence not expressed in the writing can be the subject of a valid strike during the contract term.

In any event Section 8(d) would prohibit a contractual arrangement preserving any part of the right to strike during the renegotiation period. *Penello (NLRB)* v. *UMW*, 88 F. Supp. 935, the "able and willing" case involving a strike for a non-contract purpose.

Argument.

I.

Employees who strike during the renegotiation period of a contract lose status for the enforcement purposes of NLRA even though they are unfair labor practice strikers.

There is no question but that factually, the strikers in the case at bar brought themselves within the literal purview of the loss of status clause of Section 8(d). They engaged in a strike within the sixty day period following the giving of notice of intent to terminate or modify and the strike occurred while the expiring contract was still in force. Nor is there any question raised that the status of any employee had been revived by reemployment.

The "loss of status" clause, read apart from the remainder of Section 8(d), is quite clear and unambiguous; the ambiguity which controlled the prevailing opinions below was not attributed to any want of definiteness in the "loss of status" clause itself but was imported from the remainder of Section 8(d). Nonetheless, at the risk of seeming to "expound the obvious", it will be profitable to examine the "loss of status" clause independently to see whether it contains internal evidence of the intent of Congress and to see to what extent that internally evident intent dovetails into the intendment of Section 8(d) as a whole.

The loss of status clause reads:

> ". . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act.

as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The reference to Section 8 is to 29 U. S. C. Sec. 158 which Section specifies the employer conduct which constitutes unfair labor practices (Subsection (a)) and the union conduct which constitutes unfair labor practices (Subsection (b)) the remaining Subsections (c) and (d) being largely definitive of matters under (a) and (b). The reference to Section 9 is to 29 U. S. C. Sec. 159, which Section deals with representatives and elections. The reference to Section 10 is to 29 U. S. C. Sec. 160 which Section specifies the procedure for the prevention and redress of union and employer unfair labor practices.

It is immediately evident from the language that Congress has set up a standard of conduct for employees which is temporal and quantitative and in no wise qualitative. Qualitative language was not wanting if the legislature desired to use it; such language appears in the sentence immediately preceding which speaks of contract modifications effective prior to reopening dates. It would have been no onerous task to describe the standard of conduct by its objective; the Board itself (R. 348) has done quite well with its phrase "strikes to terminate or to secure a modification or interpretation of a collective bargaining contract". Or it might have been most simply stated that one who struck in violation of the Section lost status. But the legislative draftsmen in fact chose the temporal, quantitative standard of conduct and their choice of words is at least some evidence that they meant to adopt a temporal standard rather than the standard of purpose.

Again, the language goes out of its way to embrace the entire universe of employees who strike during the renegotiation period. The use of the word "any" instead of the indefinite article "an" or the unarticled plural, signifies a

purpose to bring within the ambit of the clause all employees regardless of the relationship in which they stand to the dispute at hand.

Not only is the notion of universality attached to the word "employee"; that word is defined by Section 2(3) of the Act to include

> ". . . any individual whose work has ceased . . . because of any unfair labor practice, . . ."

It is therefore plain that the universe connoted by the word "any" comprehends those whose work has ceased because of unfair labor practices. Evidently the "loss of status" clause was drawn with this very definition in the congressional mind for it limits the scope of "employee" to one employed by a particular employer which Section 2(3) requires be done by explicit statement if the contrary construction is not intended.* Express rejection of one of the implications of a statutory definition is fair evidence of deliberate retention of what remains.

There is, moreover, a further note of universality in the choice of the unqualified word "strike". That word is a word which the amending Act itself defined as follows (Sec. 501):**

> "When used in this chapter—(2) the term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

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* The text, so far as material is:

"Sec. 2. When used in this Act—

(3) The term 'employee' shall include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . ."

** See "Statutes Involved", *supra*, p. 4.

That, of course, is definition in depth; cumulating upon a known idea its cognate applications. In the quoted section, the only thing accomplished by the repetition of the word defined is the addition of the notion of universality through the use of the adjective "any" which expressly negates distinctions of kind or quality.* That Section 501 was geared specifically into the renegotiation provisions of Section 8(d) to broaden the latter is quite evident from the parenthetical inclusion of "no-contract-no-work" strikes. That Section 501** comprehended strikes qualitatively is also evident from the Section immediately following, Section 502, wherein some, but not all, "safety strikes" are withdrawn from the purview of Section 501.†

Thus, considering language alone we would at this point, to sustain the decree below have to assume that Congress made three distinct errors:

1. The use of the temporal rather than the qualitative standard of conduct.

2. The choice of the word "employee", without qualification, and its universalization.

3. The universalization of the word "strike".

While the independent occurrence of any one of those "errors" is understandable, the concurrence of all three in a single nominative clause of a single sentence is—if they were "errors"—highly improbable. Rather the concurrence of all three very strongly suggests that we are not

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* *McMurray* v. *Brown*, 91 U. S. 257.

** See "Statutes Involved", *supra*, p. 5.

† The text, so far as material, is

"Sec. 502. * * * nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.":

The reasoning of the majority holding would, apparently, permit a "safety strike" by employees not themselves exposed to the danger.

dealing with errors at all but that we are dealing with a deliberate design of Congress to still the winds of controversy from whatever quarter they blow during renegotiation. That is the reason why they speak of "any" employee and "any" strike and use a temporal frame of reference.

How well this conclusion fits in with the remainder of the "loss of status" clause will appear upon further analysis, and it will be convenient to commence this analysis with the observation that while Congress in this clause appears to have taken a measure adequate to protect its renegotiation scheme against interference from any source, it has been painfully careful not to go a single step beyond eliminating the interference. It does not declare that a strike is unlawful or that it is an "unprotected activity" merely because the strike takes place within the renegotiation period. It preserves, by highly selective language, the rights of the terminal period striker under Section 7 of the Act and, although it removes the possibility of their affirmative enforcement through Sections 8(a)(1), 8(b)(1), 9 and 10 requires all tribunals other than the N. L. R. B. to accord negative respect to those rights.[1] No penalty is laid upon a terminal period striker save insofar as he voluntarily, by timing his strike so that it complicates renegotiation, has chosen to forego the administrative remedies. His rights against an employer not involved in the particular dispute are preserved. His status is immediately restored on reemployment. His loss of status is automatic and of itself, does not terminate his employment, although

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[1] *Semble* that if the striker lost status for all purposes of the Act there could be no application of principles such as laid down in *Weber* v. *Anheuser-Busch*, 348 U. S. 468. The understanding of the Conference Committee was that an employee would lose rights not only under Secs. 8, 9, and 10 but under the basic Sec. 7 if he struck to support an unfair labor practice (H. Conf. Rep't 54 (Appendix 60)) which would include an "economic" strike in the renegotiation period (Sec. 8(d)(4)).

his employer may elect to discharge him. The "loss of status" clause operates only on the striker's remedies; the denial of the efficacy of the Board's remedies implied by striking is precisely equated with a denial of access to those remedies.

In essence Congress has by the "loss of status" clause provided a device which we know in other branches of the law as an election of remedies. Just as the owner of a chattel may maintain either replevin for its return or trover for its value but may not maintain both, so, within the terminal period, an employee may seek redress of his wrongs by strike or by administrative action—but he must either fish or cut bait, he cannot do both. Unless, of course, he waits out the sixty-day period before striking.

Leaving temporarily the notion of election of remedies, we have observed that the striker's loss of status is not complete in that he retains his rights under Section 7 of the Act. Let us turn now to examine the aspects in which he does lose status, starting with his loss of status for the purposes of Section 9. This section deals with representatives and elections. Loss of status deprives strikers of the right to petition for a determination of representatives; of the rights of respondents to a petition brought by an opposing interest; of the right to be counted members of any bargaining unit determined in such a proceeding; of the right to a listing of their chosen representative on the ballot; of the right to vote.

At minimum, the debarment of strikers from the exercise of such rights indicates that Congress contemplated that the issues at renegotiation time might well involve, in addition to "economic" issues, the issues of representation.[1] And it is not a far cry to the inference that Congress

[1] This is also clear from the provision of Section 8(d) absolving parties from certain duties in the event of an intervening certification.

also contemplated that a strike to force recognition* or a strike by a key group to force the splitting of a unit would be quite as disruptive of its orderly contract renewal scheme as any other variety of strike during that period. Or that a strike by an incumbent union to force a challenger to withdraw its petition would be equally disruptive.**

The language of the "loss of status" clause is broad enough to permit a petitioning union harassed by such tactics, to raise the issue of "loss of status" in a representation case quite independently of whether the employer has discharged the strikers or raised the issue. The employer, protected by his ability to discharge a striker who has lost status under Sections 8 and 10 is certainly not in need of protection through a provision that a striker shall lose status under Section 9. And it was most certainly not the design of Congress in such a proceeding to permit the employer to determine the roster of voters by his power to discharge. The conclusion is inescapable that Congress intended that any disruption, whatever its purpose should cause a loss of status under Section 9. That is why the draftsmen of the Act used terms of universality and adopted a temporal standard in writing the loss of status clause.

We know affirmatively that Congress intended that unfair labor practice strikers were to be denied the right to vote at least in some circumstances. The Conference

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* The Conference Committee specifically disapproved of the practice of permitting recognition strikers to vote, as had been done in the *National Silver* case, 71 NLRB 594 (No. 87), and suggested a change in Board policy. H. Conf. Rep't 33 (Appendix 52); it implemented the suggestion by striking out the clause of the Senate bill requiring the Board to permit unfair labor practice strikers to vote. Id. 49 (App. 59).

** Cf. R. 305, 306 detailing the efforts of complainant union to force withdrawal of Local 318 from the representation case pending at the time of the strike.

Committee responsible for the final text of LMRA struck out of the Senate Bill a clause which would have required the N. L. R. B. to permit a striker to vote if "the strike involved an unfair labor practice on the part of the employer" on the ground that it "would have had the effect of precluding the Board from *changing* its present practice" of permitting unfair labor practice strikers to vote.* The Committee stated the reason** for the desirability of the change thus

> "... the Board's policy should be so to use its powers as to encourage employees and their organizations to use the peaceful procedures under the act instead of resorting to the strike weapon. Such a policy would seem to be more in accord with the stated purpose of the act."

The clause in question also provides for a loss of status in respect of Sections 8 and 10 of the Act. Section 8 specifies the employer and union unfair labor practices which the Board may redress; Section 10 provides the procedure for the redress of the specified unfair labor practices. It is indeed difficult to discern why Congress should deny a terminal period striker his employee status for the purpose of unfair labor practices unless it conceived that he might strike on account of those unfair labor practices. The "loss of status" clause obviously presupposes the commission of unfair labor practices against the striker by the employer or by some contending union.

The fact that both Sections 8 and 10 are linked together in the loss of status clause is significant evidence of such a concept. Had Congress limited the loss of status to disqualification under Section 8 alone, then, arguably, only

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* H. Conf. Rep't 49-50 (Appendix 59).

** H. Conf. Rep't 32, 33 (Appendix 52-53).

unfair labor practices committed against a striker subsequent to the time of strike would not furnish grounds for the Board's remedies. But Congress went out of its way to block the remedy for antecedent unfair labor practices by withdrawing the employee status of the striker under Section 10. The inclusion of Section 10 in the clause is aimed clearly and directly at unfair labor practices committed prior to the strike. The clause presupposes that, at the time of strike, an unfair labor practice had been committed against the striker.

There is nothing in the loss of status clause which suggests a distinction between the antecedent unfair labor practice which is related to the strike and the antecedent unfair labor practice which is unconnected with the strike. Such a distinction would seem from a practical viewpoint to be an illusory one, for once an unfair labor practice had been committed, he who wished to strike would always be in a position to strike to remedy it.* Moreover there is nothing to prevent the calling of an unfair labor practice strike and the achievement of one or more contract objectives in the settlement of that strike.

The latter was actually attempted in the case at bar in the following framework: The existing contract contained an arbitration clause (R. 259) applicable to discharges (R. 261); at the time of strike there was pending a demand to modify this arrangement so that the arbitration should precede the discharge (Demand 2, Resp. Ex. 3, R. 265, in evid. R. 74); although the strikers could have compelled arbitration of the Ciccone discharge under the existing

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* In a strike of mixed motivation, it would have to be demonstrated that the strike would have occurred even if the unfair labor practice had not been committed, a demonstration obviously impossible save in very unusual circumstances. *NLRB* v. *Barrett Co.*, 135 F. (2nd) 959, 961-962; *NLRB* v. *Remington Rand, Inc.*, 94 F. (2nd) 862, 872.

contract,[1] they did not (T. Ex. Finding R. 305). Instead the striking union leadership demanded, on the day following the calling of the strike, the reinstatement of Ciccone stating that it was "the only issue at the moment" (R. 304) and protesting "* * * why didn't you fire him through your arbitration procedure?" (R. 46).

But if we assume, *arguendo*, that a distinction so illusory in practice can be made, so that the loss of status affects only the antecedent unfair labor practice unconnected with the strike, then we must inquire why the loss of status clause was enacted at all. For the strike of the incumbent bargaining agent designed to alter working conditions—the economic strike, so-called—is by Section 8(d)(4) prohibited during the 60-day period as an unfair labor practice and Congress recognized that

> "* * * obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act."*

Can it be that Congress, having mistakenly adopted a temporal standard, mistakenly interdicted "any" employee and mistakenly applied the clause to "any" strike has also mistakenly enacted an unnecessary sanction, a sanction which achieves nothing not achieved by the remainder of Section 8(d)? Especially when it was so conscious of the lack of necessity of specifying a penalty for those who supported unfair labor practices that it struck out of the

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[1] The strikers, other than Ciccone, were not discharged until the strike had been in progress for a month.

* H. Conf. Rep't 40 (Appendix 56-57). The Conference Committee deleted specific provisions of the House Bill depriving employees who supported unfair labor practices of the protection of the Act repeatedly asserting that they were unnecessary and citing *Thompson Products*, 72 NLRB 150; op. cit. pp. 38-39, 42, 54, 55, 59 (Appendix 54-55, 58, 60, 61-62).

House Bill specific provisions to that effect?* Was it by oversight that the "loss of status" clause was left in the final bill when co-terminous (as the Board would have it) provisions of the House Bill were deleted as unnecessary? Or is it a sounder inference that Congress left the "loss of status" clause in the final bill because it accomplished a purpose which was not accomplished by declaring a terminal economic strike to be an unfair labor practice and thereby rendering the immunities of the Act unavailable to the participating strikers?

Why is it that a Congress which, in the provisions immediately preceding the "loss of status" clause, has with fine discrimination, recognized distinctions between "employees" and "labor organizations" in imposing duties on them, and recognized distinctions between representatives privy to the contract and those not in privity, finds it necessary to turn upon the individual employee—and turn upon him with a blunderbuss belled by words of universality and hair-triggered by a temporal standard to render him *hors de combat* in the arena of the NLRB?

The world of industrial relations is no flat earth composed of single, internally cohesive unions versus single employers. It is respectfully submitted that the Congress realized that the stresses of contract renegotiation are often not merely bilateral but multilateral** and that human

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* See footnote immediately preceding.

** At the time of the enactment of the Taft-Hartley Act, the Bureau of Labor Statistics was using the following categories of strike issues (Monthly Labor Review, May 1947, Vol. 64, No. 5, p. 795):

Wages and hours: wage increase; wage decrease; wage increase, hour decrease; wage decrease, hour increase; other.

Union organization, wages and hours: recognition, wages and/or hours; strengthening bargaining position, wages, and/or hours; closed or union shop, wages, and/or hours; discrimination, wages and/or hours; other.

nature, the general law of contract and the "contract bar" doctrine of the Board combine to concentrate in the terminal period the incidence and intensity of inter-union rivalry and intra-union friction. Congress therefore realized that an enactment which, by making a strike designed to accomplish contract changes an unfair labor practice, deprived economic strikers, and them alone, of the protections of the Act was not enough to assure orderly resolution of the questions attendant upon contract renewal in the manner provided by the statute. It had to go further.

It had to protect the incumbent bargaining agent against its own internal pressures—its rival political factions which might seek to usurp hegemony by striking in defiance of the leadership. It had to protect the employer against the feigned "spontaneous" walkout* connived at by the existing leadership of the incumbent but disavowed by that leadership, and presenting an almost insuperable barrier to legal proof. It had to protect the incumbent against the challenging union which might seek to divert loyalty by diverting the issues through strike. It had to protect the challenger against the incumbent which might seek to unify the loyalties of the employees through a strike, or force the challenger to withdraw or modify a representation petition.** It had to extend these protections to those who in good faith obeyed the Congressional

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Union organization: recognition; strengthening bargaining position; closed or union shop; discrimination; other..

Other working conditions: job security; shop conditions and policies; work load; other.

Interunion or intraunion matters: sympathy; union rivalry or factionalism; jurisdiction; union regulations; other.

* Illustrated by the strike involved in *U. S.* v. *Int. Union, United Mine Workers*, 177 F. (2nd) 129, cert. den. 338 U. S. 871.

** Note that in the case at bar the strike objectives included withdrawal of a rival petition (R. 305, 306).

mandate and to those who, in orderly fashion, sought the resolution of the representation questions attendant upon renegotiation through the administrative measures provided by Congress.

The conclusion that Congress by the "loss of status" clause intended to go beyond disqualification for what might be called "contract items" and reach all forms of disruption, whatever the source and whatever the reason is strongly buttressed by its legislative history. The "loss of status" clause originated in the Senate (S. 1126) where it was in immediate juxtaposition to the paragraph requiring the continuance of existing contract conditions (the two sentences intervening in the Act as passed are mutations of the House proposal requiring a superseding bargaining agent to attorn under the existing contract for its unexpired term). But S. 1126 also made breach of a collective contract a specific unfair labor practice.* The "loss of status" clause therefore would have been completely useless unless it were intended to reach conduct not provably violative of the contract as it might be extended in time by section 8(d); conduct, for example, like a strike which is affirmatively permitted under the contract** or conduct like a recognition strike.

Now the mechanism provided by Congress to meet these demands of equity—the "loss of status" clause—is not at all penal in character; the availability of remedies is merely made contingent upon their use to the exclusion of strikes. It provides that he who strikes shall thereafter

* This provision was not eliminated until the bill was in conference. The Conference Committee eliminated it for the reason that contract litigation should be the province of courts and arbitrators. H. Conf. Rep't 41, 42 (Appendix 57).

** *E. g.* under the contract between General Motors and UAW-CIO a strike over production standards is permissable. Vol. 5 CCA Labor Law Reporter (Service), par. 59,905, Clauses .28, .29, .18, .19, .59, .60.

be disregarded in the working out of the administrative remedies provided for the orderly resolution of renegotiation and representation questions. In effect, Congress says to the employee "You may not ride two horses at once. You may not strike to get rid of an adversary union and at the same time insist on your right to vote it out.* You may not seek by decision of the Board the reinstatement of a dischargee that he may vote in your favor, and at the same time try to overreach the Board's possibly adverse decision by striking for his reinstatement. Don't strike to unseat your leadership while your leadership is debarred from ordering a strike and then, when you are ousted from your job, ask the Board to reinstate you. If you engage in a strike disavowed by your leadership, pursue your strike remedy exclusively and do not expect the Board to unravel the questions of whether or not you were authorized or whether your purpose involved economic, non-economic or mixed objectives. We give you an election of remedies—you may strike or you may pursue your administrative remedies, which are adequate for unfair labor practice questions and representation questions—but your election binds you".

"We have provided for you a set of remedies. You may deem, in particular cases, that a strike is a more efficacious remedy. In such case you may strike; if you win your strike, well and good; we restore your status. But if you lose your strike, you have disrupted the renegotiation process to pursue an inefficacious remedy; this is unreasonable, and we will leave you where we find you. We do not render you "helpless during a set period"**; you have your

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* A practice specifically objected to in the Conference Report, citing with approval the concurring opinion of Board Member Reynolds in *The National Silver* case, 71 NLRB (No. 87) 594, 602. H. Conf. Rep't, 33; (Appendix 52).

** Board majority opinion, R. 350.

choice of remedies, but if the strike is not the efficacious remedy in your circumstances, then it is unreasonable to use it and disrupt renegotiation. If you use the strike weapon thus unreasonably, you may no longer resort to the remedies which you deemed so slow or inadequate that you rejected them in favor of a strike."

Thus considered, the universality, the temporal standard and the scope of status loss are no mere verbal accidents. They are deliberately chosen to achieve a result functionally related to the objective of assuring peaceful contract renegotiation. Congress has not mistakenly said "any strike", "any employee", "sixty day period"; it has not mistakenly enacted a sanction which it said was unnecessary; it has rather enacted a logically coherent protection for those upon whom it has laid the duty to bargain without strike broad enough so that their efforts may not be disrupted for any reason nor by any interest.

It can be said that in doing this Congress subordinated certain protections previously existing against unfair labor practices to the procurement of smooth contract renegotiation. That cannot be denied; it is explicit on the face of the "loss of status" clause; the clause seeks to accomplish nothing else. Congress no doubt balanced the rights of employees under Sections 8, 9 and 10 of the Act against the interests of management, labor and the public in orderly contract renegotiation and decided that the latter interest was paramount at least to the extent of requiring the withholding of strike action for a limited time. But that is just the sort of determination which is peculiarly within the legislative competence. No question of legislative power is raised by a mere requirement that if remedial action of the Board is to be sought, an unfair labor practice strike be delayed until pending economic issues have been resolved by agreement or until it has been determined that a strike

or lockout is necessary to resolve the economic issues. The right to strike is not involved here; merely the availability of remedies not private in character and wholly statutory in their origin* and the legislature might well decide to deny access to such remedies to those who insisted upon compounding the already complex economic issues of renegotiation by adding the more insoluble issues of unfair labor practice strikes and recognition strikes and the like.** It should be emphasized that there is no loss of status unless the strike occurs within the sixty day period; an employee may enjoy both the right to strike and the Board remedy by waiting out the prescribed time.

Still examining the language of the "loss of status" clause, let us observe that Congress may have had an additional objective in mind in using a temporal standard. Such a standard is crisp and clear—its limitations are readily ascertainable by those expected to observe it—average employees. On the other hand, the standard of conduct posed by the opinions below, even if univocal, is one presenting a host of imponderables, fact questions, law questions and credibility questions difficult enough for the employer to resolve but hopelessly beyond the informational limitations,† the legal acumen and the general ability of those charged with observing the standard in the first instance to determine. The latter standard is pregnant with the possibility of completely defeating the Congressional

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* *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 48; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

** The tendency of representation questions to inhibit settlement of economic issues was the subject of comment in *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 42, and *Virginian Ry.* v. *System Fed. No. 40*, 300 U. S. 515, 545.

† For a case wherein employees struck in the honest but mistaken belief that a fellow-employee had been discharged for union activity see *NLRB* v. *McCatron, d. b. a. Privo Valley Lbr. Co.*, CA-9 216 F. (2d) 212; cert. den. 348 U. S. 943.

policy by the drumming up of non contract strike issues, by the feeding of partial truths or other misinformation to employees—in short by the introduction of "ifs, ands and buts" into the clear language of the Congressional mandate.

The possibility of mischief of this character is enhanced by the fact that one of the recognized unfair labor practices (Sections 8(a)(5), 8(b)(3)) consists of refusing to bargain in good faith. Presumably, under the rulings below, an employee who strikes because of the failure of the employer —and perhaps of the union*—to bargain would be entitled to reinstatement.** Did Congress envision that an average employee would be able to apprehend that the term "refusal to bargain" is a term of art not to be confounded with the notion of refusal to bargain which, as a union man,† he might hold and that he would be able to arrive at a correct conclusion on the reports of his negotiators? Or did Congress deliberately seek to avoid just such uncertainties and "*ex parte* adjudications by strike" by adopting as the standard of conduct the clear phrase ". . . within the sixty-day period . . ."?

In sum, the language of the "loss of status" clause is not at all ambiguous; there is much internal evidence that the breadth of the clause was achieved by language chosen with deliberation to that end; the end is consonant with the pertinent legislative history and there is a functional correlation between its provisions and the objective of ensuring

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* *Cf. Monsieur Henri Wines Ltd.*, 44 NLRB 1310; and *Wallace Corp.* v. *NLRB*, 323 U. S. 248, for illustrations of the type of union conduct in bargaining which could precipitate a strike apart from any act of the employer.

** *NLRB* v. *Remington Rand*, 94 F. (2nd) 862.

† *Cf.* the form of the strike support resolution passed by the membership of the union in "*Matter of Western Union Telegraph Co. (A. C. A.)*, 299 N. Y. 177, 181: "We will take every action necessary to force (the employers) to *bargain in good faith* . . ."

protection for the legitimate claims of all interests during the critical time of renegotiation.

It has been noted above that the Board (R. 348-350) and the learned Court below (R. 368-370), in their respective prevailing opinions found the "loss of status" clause ambiguous by importing into it the concept that Section 8(d) considered as a whole is "limited in scope to the contract modification or termination area" so that the word "strike" does not mean "any strike" as Section 501 says it does; but means instead "strike to modify or terminate a contract".

There is involved in this argument a clear *non-sequitur*. It by no means follows from the premise that Congress in writing the Section as a whole was concerned with the orderly renegotiation of contracts that it sought to prevent only negotiation strikes. To arrive at that conclusion it would have to employ the minor premise that only negotiation strikes interfere with negotiation. That minor is not only obviously untrue; its precise opposite motivated the 74th Congress to enact the Wagner Act* and the 80th Congress to continue it.

But if we accept the rejection of the Congressional definition of the word "strike" and accept also the *non-sequitur* we are still left with a problem: why did Congress deal at all with the employee as an individual? It had already prohibited a strike for contract modification or termination; why put a precisely co-terminous obligation on the individual employee? It is respectfully submitted that the reason for dealing with the individual employee as such was the realization that the employee constituted a problem separate and apart from the problem of the incumbent labor organization. The abolition by the Taft-Hartley Act of the disciplinary features of the closed and union

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* *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 42.

shop destroyed the possibility of control by the incumbent of the acts of the individual employee. Having given the employee power as an individual, Congress by the "loss of status" clause sought to fasten responsibility on him as an individual. For a myriad of reasons the employee might disrupt renegotiation. Some of the reasons might accord with the objectives of the incumbent union; some might not: some might favor a challenging union; some might not: some might be disavowed by the incumbent; some might not. But a strike for any reason would be disruptive: therefore any strike by any employee was embraced in the "loss of status" clause.

The learned Court of Appeals would read the "loss of status" clause as if it read "Any employee who strikes to terminate or modify a contract within the 60 day period shall lose his status * * *". Such a construction carries with it the implication that Congress was amenable to permitting employees to strike for that purpose at any other time. Section 8(d) lays upon the employee as such no obligation to serve notice or to offer to bargain.* But this negative implication flies in the face of the entire purpose of Section 8(d). It is only by reading the "loss of status" clause as referring primarily to strikes permissible at any other time that the clause becomes meaningful.

There is nothing in the general purposes of Section 8(d) which is inconsistent with the broad "loss of status" clause; nor repugnant to it; nor is the result of a literal application of Section 8(d) absurd. Hence there is nothing to call into play the process of interpretation.**

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* For a situation in which the members of the union forced a change in wages without acquiescence of the incumbent union, see *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc.*, 265 F. 397 (D. C. E. D. La. 1920).

** *Unexcelled Chemical Corp.* v. *U. S.*, 345 U. S. 59; *Dameron* v. *Brodhead*, 345 U. S. 322.

The repugnancy which, reading between the lines, disturbs both the Board majority and the Court of Appeals majority is not a repugnancy between the "loss of status" clause and the remainder of Section 8(d); it is a repugnancy between the "loss of status" clause and the so-called "fundamental rights" of Sections 7 and 8 of the Act as enforceable through Sections 9 and 10. But that such a repugnancy was intended to exist is indubitable; for the "loss of status" clause explicitly invades those "fundamental" rights. Such an invasion is not unique.*

A short observation on the facts of the case at bar might well serve to conclude this point. It will be recalled that in August of 1950 a Local 65 of the Wholesale and Warehouse Workers Union instituted an organizing drive at Petitioners' plant (R. 274). On September 7th, prematurely, the incumbent Local 22045 demanded a wage increase of 12½¢ per hour (R. 275). By September 28th, Local 65 had progressed to the point of filing its petition for certification (R. 274). On October 10th, Local 22045 served its 60-day notice (R. 340), and on October 20th it doubled its wage demand and added a demand for a 3% welfare fund (R. 277). At that point the unfair labor practices commenced (R. 278). On October 24th, Local 318, the aided union intervened in the pending representation proceeding of Local 65 (R. 285). On October 23rd, Local 22045 adopted a resolution transferring allegiance to Local 3127 of the Carpenters' Union for the stated purpose of procuring a welfare fund (R. 287). On November 10th, Ciccone was discharged and Local 3127 struck (R. 293-295). On December 13th, Local 318, yielding to picketing of its office by Local 3127, withdrew its claim in the representation proceeding (R. 306). Two weeks later Local 65, for reasons which do not appear, withdrew its petition (R. 306).

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* *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355.

This fact situation, not at all atypical, serves to illustrate the inextricable interrelationship between economic issues, representation issues and unfair labor practice issues. Congress was not so naive as not to know the inextricable character of such issues and the fact that they tend to occur in somewhat the same pattern in the renegotiation period.

But the really remarkable thing about the fact situation is that the striking union prevailed over both the union favored by the employer, Local 318 and the union opposed by the employer, Local 65. Had Local 65 raised the issue of loss of status in the representation proceeding could it not have shown that Local 22045-3127, which had adequate remedy by contract for the precipitating discharge, had nonetheless employed the strike to unify the employees against its peaceful missionary efforts?

Congress had no such shallow ideas of the issues at renegotiation time as the Board majority would have us believe.

II.

Employees are bound by an unlimited no-strike clause even though they strike to protest unfair labor practice where the strike causes related to matters expressed in the contract: a no-strike clause is to be construed to favor industrial peace.

The contract between Local 22045 and the Petitioners was to have terminated on November 30, 1950. The strike occurred on November 10th, some twenty days before its expiration.

The wording of the 'no-strike' clause was:

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind

with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

The Court will note the universality of the undertaking revealed by the terms "no interference", "any kind", "any interruptions", "any strike". It would be quite difficult to devise more comprehensive or less ambiguous language.

But the Board, professing to interpret that language in the light of the remainder of the contract finds the particular strike not a breach. It says:

> "In the present situation the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents. . . . The November 10th strike was, as conclusively shown by the record, a protest against unfair labor practices apart from the terms, meaning and application of the contract and in no manner was an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees."

And the learned Court below follows the Board in somewhat less guarded language:

> "However, since the strike was caused and prolonged by the respondents unfair labor practice, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract. • • • The right of employees to strike in resistance to unfair labor practice by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make

> it clear that strikes caused by the employer's unfair labor practices were included in the prohibition (citation). Unfair labor practices in violation of the Act were in no way covered by the contract. . . ."

Now the conclusion that a strike was caused by conduct violative of Section 8 of the Act, i.e., that the strike was an unfair labor practice strike is irrelevant on the question of whether or not that strike breached the no-strike clause of a contract. For Section 13 of the Act, as amended, provides that

> "Nothing in this Act, except as specifically provided for herein shall be construed so as . . . to affect the limitations or qualification on (the right to strike)."

To hold that a given strike is not within the coverage of a no-strike clause because it resulted from a violation of Section 8 of the Act would obviously be to construe the Act to diminish a limitation or qualification of the right to strike agreed upon by the parties.

The Board recognized this (R. 345, Footnote 8) and disclaimed that it was holding that the involvement of unfair labor practices took the strike out of the contractual coverage. It claimed instead that the "terms and scope of that clause (sic; "the contract"?) itself" were not broad enough to cover a strike "in protest of matters and actions not covered or in any respect demanded by the contract . . ."

Passing by the questionable *rationale* by which the Board reached the conclusion that the coverage of the no-strike clause is limited to strikes to resolve "differences . . . as to the meaning and application" of the words within the four corners of the instrument and accepting the conclusion at its face value we inquire "What were the matters and actions not covered?"

The Board has found them to be (R. 340, adopting R. 313)

> "(a) inducing and encouraging the representative of Local 22045 to agree to substitute Local 318 in its place and stead;
>
> (b) inducing and encouraging the representative of Local 318 to engage in a campaign to displace Local 22045 as the bargaining agent of their employees;
>
> (c) sponsoring, supporting and assisting the organizational campaign of Local 318;
>
> (d) giving financial rewards to employees active in the organizational campaign of Local 318;
>
> (e) inducing employees by threats, warnings of reprisal, and promises of benefit to become and remain members of Local 318 and to refrain from becoming or remaining members of other competing unions."

And also (R. 316)

> "... discharging Frank Ciccone on November 10, 1950. ..."

The *gravamen* of all of these findings is the attempt to substitute Local 318 for Local 22045.

But each of these "matters or actions" was "covered or demanded"* by the contract. The recognition clause (*supra*, p. 9; R. 254 ¶1(a) excluded Local 318 from achieving recognition during the contract term. The union shop clause (*supra*, p. 9, R. 254 ¶1(a) prevented defections from

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* This peculiar phrasing originated in the Board's attempt to explain away its own *National Electric Products* decision, 80 N. L. R. B. 995. That case held that a strike breached a contract though it was an unfair labor practice strike. The Board now explains that the employer had contracted to commit the unfair labor practice, and in that sense his conduct was "demanded" by the contract.

the membership of Local 22045. A clause (R. 254 ¶1(b) provided for the accretion of new employees to the membership of Local 22045 and the discharge of those failing to join. The dues of Local 22045 were secured by a check-off clause (R. 254-255 ¶3) and a delinquency discharge provision (R. 254 ¶1(b), and were to be segregated as checked off. Membership status in Local 22045 was expressly made the subject of arbitration (R. 254 ¶2). Whether there was "proper cause" for the Ciccone discharge was reviewable in arbitration (*supra*, p. 10; R. 261 ¶22). The arbitrator was empowered to deal with a threatened as well as with an actual breach of contract (*supra*, p. 10; R. 259 ¶19) and his powers encompassed the question of whether a lockout (and presumably a threat of lockout) had occurred (*supra*, p. 10; R. 255 ¶¶6, 7).

Thus, even accepting the Board's unsupportable narrowing of the "no-strike" undertaking and its own findings of fact we are forced to the conclusion that every one of the six stated causes which cumulatively (R. 342), it is found, resulted in the strike involved matter on which the parties had made specific contractual commitments. The legal conclusion of the Board that the "terms and scope" of the no-strike clause were not broad enough to cover the strike therefore falls—and on its own premise.

It is abundantly clear that what has happened here is that the Board has permitted its judgment to be colored by its conclusion that the stated conduct constitutes unfair labor practices. If has not judged that conduct by the contractual language. It has judged that conduct by applying the standard of whether or not the conduct breached the Federal Act. This is precisely contrary to the statutory canon of construction set out in Section 13 of the Act.

The rejection of the contract defense therefore must fall—even on the Board's own premises. We noted, how-

ever, the questionable character of the premise that the coverage of the no-strike clause should be narrowed so that it related only to strikes arising out of differences as to the meaning and application of the words within the four corners of the instrument. Originally counsel had anticipated a demonstration that, by the law of New York, the premise was erroneous. However, the division of the Court in the *Westinghouse* case* subsequent to the grant of certiorari in the case at bar throws doubt upon the applicability of New York law to the interpretation of a labor contract affecting interstate commerce. Counsel will therefore essay a demonstration that the premise is erroneous whether the New York law be applied or whether Federal law be applied.

The law of New York on the issue is clearly contrary to the construction of the contract which forms the Board's premise. In *Matter of Western Union Telegraph Co. (A. C. A.)*,** the New York Court of Appeals construed a union undertaking

> ". . . that there shall be no strikes or other stoppages of work during the life of this contract"

as barring a refusal by employees to handle "struck traffic". The purpose of the strike—to aid fellow unionists in a dispute with their respective employers (some were employed by Western Union)—was quite "apart from the terms, meaning and application of the contract and was in no manner an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees" (Board Op. R. 345). The claimed

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* *Assoc. of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U. S. 437, 99 L. Ed. (Advance, p. 368).

** 299 N. Y. 177, 86 N. E. 900. Conway, Dye, Bromley and Lewis, J.J.; Dissenting, Desmond and Fuld, J.J. and Loughran, Ch. J.

justification for the refusal to handle struck traffic was a custom of the industry to that effect. The arbitrator found that such a custom existed and ordered reinstatement with back pay. The Court of Appeals vacated the award. Neither in the prevailing nor in the dissenting opinion is there any suggestion that the scope of the no-strike clause was limited to the matters settled by the agreement or that the strike was validated because no contractual undertaking (other than the no-strike clause itself) was involved.

But if the New York law does not control as such, or as Federal law operating by consent of Congress, it becomes necessary to examine what Federal law there may be. There is a dearth of Federal decisional law on the subject which makes it necessary to examine the subject *de novo*.*

To begin with, the character of the conduct as offensive to the National Labor Relations Act is completely irrelevant to the construction of the no-strike clause of a contract. As previously observed, Section 13 of that Act precludes a construction of a contractual limitation founded upon the statutory concept of unfair labor practices.

The Court of Appeals seems to suggest (R. 366-367) the existence of a non-statutory notion of unfair labor practices which underly a "fundamental" right to strike. It would seem sufficient to remark, in answer, that legal history discountenances the suggestion; for the terminology did not exist prior to the statutory enactment. Teller says:

> "Strikes or other activity carried on to protest anti-union discrimination on the part of an employer have . . . received scant favor in the cases, probably

* The utility of *N. L. R. B.* v. *Rockaway News Supply*, 345 U. S. 71 as a solvent on this question is impaired by the offer of proof element and the arbitration award element therein.

> because the common law recognizes no right on the part of labor unions and organizing employees to be free from interference, restraint or coercion by employers."*

The Board, recognizing the limitations of Section 13 and being unable otherwise to characterize the employer conduct flies to an extreme canon of construction. It says (R. 344) that a no-strike clause unlimited on its face is, nonetheless, limited to an undertaking not to strike except over "difference . . . as to the meaning and application of (the) agreement, including questions of meaning, interpretation, operation or application of any clause of (the) agreement or any breach or threatened breach of (the) agreement."

In substance, an unlimited no-strike clause is to be construed not by its own broad language but merely as a surrender of the right to seek by strike a favorable interpretation of the written terms of agreement. In a sense the Board writes a Statute of Frauds with a corollary parole evidence rule into labor agreements. The substance of the Board's canon appears to be that, since the no-strike undertaking is in derogation of the right to strike,** the employees are concluded only as to those subject matters specifically set out in the agreement.

It is important to note that the Board asserts no repugnancy between the "no-strike" clause and the balance of the contract; no reservation of the right to strike implied from

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* Labor Disputes and Collective Bargaining §89, Vol I, p. 263. The conference committee did not regard the right to strike to protest unfair labor practices as sufficient justification for the retention of the right to vote (H. Conf. Rep't 49, Appendix 59).

** A reflection of the early philosophy of the Board that any limitations on the right to strike "would no doubt be unconstitutional", Second Ann. Rep't, p. 4. The House Conference Report on the Taft-Hartley Act took care to assert that the "right to strike is not an unlimited or unqualified right." H. Conf. Rep't 59 (Appendix 63).

some other language or from the inconsistency of some conduct required by other clauses. Nor is any ambiguity in the language employed in the "no-strike" clause asserted.

Rather the naked concept of derogation of the right to strike is used to limit the undertaking. While it might appear that a commitment not to engage in any strike or work stoppage and a commitment against interference of any kind or interruption or slackening of production of work by any member would seem to satisfy even the "derogation" test, it is respectfully submitted that the "derogation of the right to strike" canon of construction of no-strike clauses is, if Federal law be the criterion, flatly opposed to the major objectives of Federal legislation.

For the very design of the Taft-Hartley Act is to prevent the interruption of commerce by procuring voluntary waivers of the right to strike. That is another way of saying that consensual derogation of the right to strike is the major purpose of that Act. It follows that a no-strike clause should be construed not by narrowing it but by broadening it to include the whole right to strike except insofar as the union has expressly or by fair implication reserved the same. The right of some people to strike cannot be exalted over the right of all the people to the free flow of commerce.

It must not be forgotten that a labor contract is no longer a wholly private agreement. It is an instrument of commerce entered into in pursuance of a public duty laid upon employer and employee; it is affected with a public interest and is to be construed, in that interest *in favorem pacis*.

Not only is the Board's canon of construction wrong, but its result is wrong judged by the known facts of industrial relations. The argument of the Board implies that the substantive items of the contract furnish the measure of the no-strike obligation. But what of those elements of

the bargain not expressed in the contract? In the great majority of contract negotiations one or the other of the parties makes demands which, before the final settlement, are withdrawn, modified or transmuted.* Can the Newspaper Guild, for example, demand seniority in the editorial department of a newspaper, allow its demand to be transmuted into a severance pay clause and, after the contract has been signed strike for seniority? Or could the union in the case at bar have demanded a "broad form" arbitration clause coupled with an offer of the "no-strike" clause as it appears in this record, permit itself to be bargained down to the limited form of arbitration clause now before the Court and, after signing, strike for pensions?

We need not discuss whether, in some case there might arise a situation in which the "no-strike" clause of the contract might validly be modified by other parts of the instrument. It is sufficient that no such situation exists herein. Neither the arbitration clause nor the scope of the substantive undertakings furnish a reason for qualifying a clause which the Trial Examiner described as containing "no express qualification".

While there appears to be a dearth of decisional law construing "no-strike" clauses, courts in various cases have held that the mere concerted refusal to render service under agreed conditions of work, without specific reference to a no-strike clause, was a breach of contract, the most prominent of these cases being the *Sands Mfg. Co.* case.**

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* See the reference in *N. L. R. B.* v. *Rockaway News Supply*, 345 U. S. 71 to the offer of proof as to withdrawal of a demand.

** *NLRB* v. *Sands Mfg. Co.*, 303 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682. For a New York case holding that a threatened strike may be enjoined as a breach even though the purpose is to alter a condition of employment not stated in the contract nor shown to have been expressly the subject of negotiation see *Assoc. Flour Haulers* v. *Sullivan*, 168 Misc. 315, 5 N. Y. S. 2d 982. The latter case recognizes that a labor contract is a mere skeleton which leaves much unsaid.

wherein it was held that such conduct justifies discharge. While it is true that the work stoppage in that case was designed to secure a change of the contract conditions—a seniority question—it is quite clear that the gravamen of the breach lay not in the attempt to secure a change but in the failure to work under the agreed conditions while the change was being sought. This would seem to imply a canon of construction of "no-strike" clauses to the effect that, the employees having stated in their contract the conditions under which they will work, they will work thereunder unless they *expressly* reserve the right to cease work under stated circumstances.

But a further question exists. Can a contract be validly written which will preserve any part of the right to strike during the terminal period of a contract? The Board itself sought and obtained an injunction against the United Mine Workers' celebrated "able and willing" and "memorial period" clauses upon the ground that such clauses violated the obligation under the 4th duty paragraph of Section 8(d) to continue a contract in force *without strike* during a terminal period. The evidence showed that the purpose of the strike was not to obtain contract changes but to prevent demoralization of the industry by a fall in the price of coal because there was too much coal above ground. But no nice distinction between contract objectives or non-contract objectives appeared either in the evidence or in the decree.* Surely the Board is not suggesting that we bargain for a form of contract which had been held to be an unfair labor practice?

It is respectfully submitted that the rejection of the breach of contract defense is supportable neither on the facts as found nor on the law.

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* *Penello* v. *Int. Union U. M. W.*, 88 F. Supp. 935.

Conclusion.

The decree should be reversed insofar as it directs reinstatement of the strikers and back pay, and the matter remanded to the Circuit Court of Appeals for the Second Circuit with instructions to expunge the stated directions.

Respectfully submitted,

BERNARD H. FITZPATRICK,
Counsel for Petitioner.

Dated New York, N. Y.,
August 20, 1955.

APPENDIX.

Abstracts from Conference Committee Report on LMRA 1947

HOUSE CONFERENCE REPORT NO. 510 ON H. R. 3020, 80TH CONG., 1ST SESS.

[30] TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Both the House bill and the Senate amendment in title I amended the National Labor Relations Act in numerous respects.

In amending section 1 of the National Labor Relations Act (the policy thereof) the House bill omitted from the present law all of the so-called findings of fact, some of which have been so severely criticized as being inaccurate and entirely one-sided. The Senate amendment rewrote the findings and policies contained in section 1 of the National Labor Relations Act so that those findings will not hereafter constitute an indictment of all employers. At the same time the [31] Senate amendment inserted in the findings of fact a paragraph to the effect that experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce. The Senate amendment further declared the elimination of such practices to be a necessary condition to the assurance of the rights herein guaranteed. Thus under the Senate amendment the findings and policies of the amended National Labor Relations Act are to be "two-sided." The conference agreement adopts the provisions of the Senate amendment in this respect.

* * * * * * *

[32] (3) *Employee.*—The House bill changed the definition of "employee" contained in the existing law in several respects:

(A) Under the existing definition of "employee" the Board has treated employees striking for wages, hours, or working conditions differently from employees striking because of an alleged unfair labor practice on the part of the employer. In the former case the Board has said that the individual striker retains his status as an employee under the act only until he is replaced, whereas in the latter case the Board has said that the individual striker retains his status as an employee so long as the labor dispute is "current". This Board practice has had the effect of treating more favorably employees striking to remedy practices for which the National Labor Relations Act itself provides a peaceful administrative remedy, than employees who are striking merely to better their terms of employment. The House bill in the definition of employee provided in specific terms that these two classes of striking employees should be treated in the same fashion, i. e. they were to retain their employee status until replaced.

* * * * * *

[33] (C) The conference agreement does not contain the specific provisions of the House bill dealing with the status of "unfair labor practice" strikers. Since the different treatment of unfair labor practice strikers and economic strikers is simply a practice of the Board which the Board can change within the framework of the existing law, it was thought by the House managers that the Board should be given an opportunity to change this practice itself rather than needlessly complicating the definition of the term "employee."

In the *National Silver Company case* (71 N. L. R. B. 87) (1946), at least one member of the Board thought that the Board's policy should be to so use its

powers as to encourage employees and their organizations to use the peaceful procedures under the act instead of resorting to the strike weapon. Such a policy would seem to be more in accord with the stated purpose of the act.

[34] The Senate amendment also required, as part of the bargaining procedure, that no party to any collective bargaining contract should terminate or modify the contract unless the party desiring such ter- [35] mination or modification (A) served a written 60-day notice of the proposed termination or modification on the other party, (B) offered to meet and confer with the other party with respect thereto, (C) notified the Federal Mediation and Conciliation Service (a new independent agency later discussed) within 30 days after such notice of the existence of the dispute, if agreement had not been reached by that time, and (D) continued in full force and effect, without strike or lock-out, all the terms and conditions of the existing contract for a period of 60 days after the notice of desired termination or modification was given or until the expiration date of the contract, whichever occurred later.

An employee who engaged in a strike within the 60-day period just described lost his status as an employee of the particular employer for the purposes of sections 8, 9, and 10 of the act.

The conference agreement, like the Senate amendment, does not contain a definition as such of "collective bargaining", but does, in section 8 (d) of the amended Labor Act, contain provisions similar to those of the Senate amendment, with certain clarifying changes. One of the important changes is the inclusion of a provision indicating that the duty to bargain is not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. In addition, the conference agree-

me . omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract.

. . . . . .

[38] Rights of Employees

Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First*, it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second*, it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a "sit down" strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co.* v. *N. L. R. B.*, 149 Fed. (2d) 987) (1944).

Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other im- [39] proper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, in the *American News Company case* (55 N. L. R. B. 1302) (1944) the Board held that employees had no right which was protected under the act to strike to compel an employer to violate the wage-stabilization laws. Again, in the *Scullin Steel case* (65 N. L. R. B. 1294) and in the *Dyson case* (decided February 7, 1947), the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second *Thompson Products case* (decided February 21, 1947) the Board held that strikes to compel the employer to violate the act and rulings of the Board thereunder were not concerted activities protected by the provisions of section 7. The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N. L. R. B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference

committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. Again, inasmuch as section 10 (b) of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practicable, be followed and applied by the Board, proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that em- [49] ployees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously per-

sons who engage in or support unfair labor practices will not enjoy immunity under the act.

* * * * * * *

[41] "The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining [42] agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

UNFAIR LABOR PRACTICES OF LABOR ORGANIZATIONS

Both the House bill and the Senate amendment defined, in a new section 8 (b) of the National Labor Relations Act, unfair labor practices on the part of labor organizations and their agents. The House bill also made the unfair labor practices described unfair labor practices on the part of employees.

Under the House bill the following unfair labor practices were set forth:

(1) Intimidating practices to interfere with the exercise by employees of rights guaranteed in section 7 or to compel or seek to compel any individual to be a member of a labor organization.

(2) To refuse to bargain collectively with the employer.

(3) To call or participate in any strike or other concerted interference with an employer's operations, an object of which was to compel the employer to accede to the inclusion in a collective bargaining agreement of matters which under the House bill were

not treated as within the proper scope of compulsory bargaining.

Under the new section 8 (b) of the Senate amendment, the following unfair labor practices on the part of labor organizations and their agents were defined:

(1) To restrain or coerce employees in the exercise of rights guaranteed in section 7, or to restrain or coerce an employer in the selection of his representatives for collective bargaining or the adjustment of grievances. This provision of the Senate amendment in its general terms covered all of the activities which were proscribed in section 12 (a) (1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12 (a). While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provisions of the House bill, participation in them, as explained in the discussion of section 7, is not a protected activity under the act. Under the House bill, these activities could be enjoined upon suit by a private employer, specific provision was made for suits for damages on the part of any person injured thereby, and employees participating therein were subject to deprivation of their rights under the act. The conference agreement, while adopting section 8 (b) (1) of the Senate amendment, does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not, as explained in the discussion of section 7, be entitled to reinstatement. Furthermore, since in section 302 (b), unions are made suable, unions that engage in these practices to the injury of another may subject themselves to liability under ordinary principles of law. Then, too, under the provisions of section 10 (k) of the conference agreement the Board can seek a temporary [43] injunction enjoining these practices pending its decision on the merits.

[49] (7) Under the House bill, in section 9 (f) (7), it was provided that no election could be directed in any bargaining unit or any subdivision thereof within which, in the preceding 12-month period, a valid election had been held, except upon a petition by employees requesting "de-certification" of a representative. The Senate amendment, in section 9 (c) (3), contained a similar provision without the exception. The conference agreement adopts the provisions of the Senate amendment. The Senate amendment also contained a provision that employees on strike who were not [50] entitled to reinstatement should not be permitted to vote unless the strike involved an unfair labor practice on the part of the employer. This provision is also included in section 9 (c) of the conference agreement with the "unless" clause omitted. The inclusion of such clause would have had the effect of precluding the Board from changing its present practice with respect to the treatment of "unfair labor practice" strikers as distinguished from that accorded to "economic" strikers.

(8) Under the House bill, in section 9 (f) (8), it was provided that if a new representative were chosen while a collective bargaining agreement was in effect with another representative, certification of the new representative should not become effective unless such new representative became a party to such contract and agreed to be bound by its terms for the remainder of the contract period. Since the inclusion of such a provision might give rise to an inference that the practice of the Board, with respect to conducting representation elections while collective bargaining contracts are in effect, should not be continued, it is omitted from the conference agreement.

* * * * * *

[54] (8) In section 10 (c) both the House bill and the Senate amendment incorporated language with respect to the Board's remedial orders in cases of unfair

labor practices by labor organizations. The House bill provided that, in addition to ordering respondents to cease and desist from unfair practices, the Board could order employers to take affirmative action to effectuate the purposes of the act, including reinstatement with back pay for employees (a provision appearing in the present act), and could also order representatives and employees to take affirmative action, and deprive them of rights under the act for not more than 1 year. The Senate amendment did not contain the provision specifically authorizing the Board to deprive representatives and employees who engage in unfair practices of rights under the act, but did contain a provision authorizing the Board to require a labor organization to pay back pay to employees when the labor organization was responsible for the discrimination suffered by the employees.

The House bill, by implication, limited the Board in its choice of remedial orders in cases of unfair labor practices by representatives not involving back pay, by specifying but one type of order that the Board might issue. The conference agreement therefore omits this provision of the House bill. As previously stated, employees are subject to the prohibitions of section 8 (b) only when they act as agents of representatives, but in these and other cases, when they are disciplined or discharged for engaging in or supporting unfair practices, they do not have immunity under section 7. The language in the Senate amendment without which the Board could not require unions to pay back pay when they induce an employer to discriminate against an employee is included in the conference agreement.

* * * * * *

[55] (10) The House bill also included, in section 10 (c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause.

The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N. L. R. B.*, 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7.

* * * * * *

[58] The House bill, in a new section 12 of the National Labor Relations Act, set forth certain activities which were treated as unlawful. Persons engaging in them were made subject to civil suit for damages on the part of persons injured thereby. It was provided that the Norris-LaGuardia Act should be inapplicable in respect of any action or proceeding involving any such activity, and any person who was found to have engaged in any such activity was to be subject to deprivation of rights under the act to the same extent as a person under the House bill found to have engaged in an unfair labor practice under section 8 (b) or 8 (c).

The activities which were treated as unlawful under this section were:

* * * * * *

[59] (3) Authorizing, participating in, or assisting any sympathy strike, jurisdictional strike, monopolistic strike, sit-down strike, or illegal boycott, or any strike

to compel an employer to accede to featherbedding practices, or any strike having as an objective compelling an employer to recognize for collective bargaining an uncertified representative or having as an objective the remedying of practices for which an administrative remedy was provided by the act, or having as an objective compelling an employer to violate any law.

• • • • • •

Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8 (b) (1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10 (c). Furthermore, under section 10 (k) of the conference agreement, the Board is given authority to apply to the district courts for temporary injunctions restraining alleged unfair labor practices temporarily pending the decision of the Board on the merits.

• • • • • •

Section 13 of the existing National Labor Relations Act provides that nothing in the act is to be construed so as to either interfere with or impede or diminish in any way the right to strike. Under the House bill, in section 12 (e), a provision was included to the effect that except as specifically provided in section 12 nothing in the act should be so construed. Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The

Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right. The conference agreement adopts the provisions of the Senate amendment.

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OCTOBER TERM, 1955.

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF.

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TABLE OF CONTENTS.

		PAGE
I.	"Loss of Status" Question	1
	Misstatements of Petitioners' Contentions Corrected	1
	The Board's Findings Are Ambiguous and Self-Contradictory	3
	The "Loss of Status" Clause Deals With a Separate Facet of Renegotiation	5
	The "Inequities" Claimed by Respondent Are Not Sustainable	6
	Procedural Delay Is No Criterion of Jurisdiction	7
	The Legislative History Supports Petitioners' Construction	7
II.	The "Breach of Contract" Question	13
	Statistical Information Negatives Respondent's Construction	13
	Correction of Reference to Section 13; Applicability	15
	Even under Respondent's "Correlative" Construction Petitioner Prevails	16
	Confusion of the Existence of Rights With Their Arbitrability	16
	Reexamination of New York Law	17
	Respondent Ignores the Agreement of the Parties	18
	Cited Cases No Aid to Construction	20

PAGE

Petitioners' Offer of Proof Does Not Support Respondent's Contention 21

Waiver of "Right to Strike; Construction 21

A Contractual Defense Is Not Barred by the Commission of Unfair Labor Practices 22

Respondent's Misapplications of Section 13 23

The Detailed Findings of the Board Control Its Conclusion 24

CONCLUSION 25

Appendix "A".—Evolution and Variant Expressions of the "Loss of Status" Clause 26

Table of Cases.

	PAGE
Benedict v. *Limited Editions Club, Inc.*, 39 N. Y. Supp. (2nd) 852, 853 (Supreme Court, Appellate Division)	18
Garner v. *I. B. T.*, 346 U. S. 483	7
Inland Steel Case, 170 F. (2nd) 247, cert. den. 336 U. S. 960	9
Labor Board Cases, 301 U. S. 1	6
Local No. 3, United Packinghouse Workers v. *N. L. R. B.*, 210 F. (2nd) 235, cert. den. 348 U. S. 822	9, 23
Matter of Western Union Telegraph Co., 299 N. Y. 177	17
NLRB v. *Sands Mfg. Co.*, 306 U. S. 332	15
National Electric Products, 80 NLRB 995	19
Thompson Products case, 72 NLRB 150	1

Statutes.

National Labor Relations Act,	
Section 8(d)(4)	1, 4, 5, 8, 9, 11, 12, 15, 26
Section 10(c)	1, 5, 12
Section 10(j)	1
Section 9(e)(3)	11
Section 13	15, 18, 23, 24
Section 10(a)	18

PAGE

Labor Management Relations Act,
Section 206-210 15
Section 305 15

New York Arbitration Law, Civil Practice Act,
Section 1448 18

MISCELLANEOUS.

S. Rept. No. 105 on S. 1126, p. 28, 1 Leg. Hist. 443 ..... 5, 10, 15, 26

H. Conf. Rept. No. 510 on HR 3020, pp. 38, 39, 1 Leg. Hist. 542, 543 ..... 1, 10, 27

H. R. 3020 6

H. Conf. Rept., pp. 38-39, 1 Leg. Hist. 542-543 12

2 Leg. Hist. 1523 4

1 Leg. Hist. 116 5

1 Leg. Hist. 244 6

1 Leg. Hist. 513 6

1 Leg. Hist. 553 10

2 Leg. Hist. 1007 10

2 Leg. Hist. 956-957 11

1 Leg. Hist. 562, 563 11

I Leg. Hist. 537 11

1 Leg. Hist. 318, 319 H. R. Comm. 12

1 Leg. Hist. 542, 543 H. Conf. Com., 2 Leg. Hist. 1538, 1549, S. Conf. 12

53 Col. L. Rev. 1023, 1025 7

"Labor-Management Contract Provisions, 1950-51" Bull. No. 1091, pp. 28-29 ..... 14, 17, 19

Supreme Court of the United States

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF.

I.

The "Loss of Status" Question.

Counsel will adopt the method of criticizing the brief on this question *seriatim*.

Misstatements of Petitioners' Contentions Corrected.

1. Petitioners' contention is not accurately stated (R. B. 44). The fourth duty paragraph of Section 8(d), sometimes cited as Section 8(d)(4), prohibits a strike by the incumbent bargaining agent only; it has no relation to the conduct of any other union group. Its sanctions are prohibitory and mandatory orders under Sections 10(c) and 10(j) and a denial of reinstatement to employees participating in a violation.[1] In contradistinction the "loss of

[1] H. Conf. Rept. No. 510 on HR 3020, pp. 38, 39, 1 Leg. Hist. 542, 543. Petrs. Brief, 54-55. Citing, *inter alia*, the second *Thompson Products* case, 72 NLRB 150.

status" clause does not prohibit any strike whatever. It does not declare that a strike is unlawful or improper. It merely bars one who strikes during the renegotiation period from the remedial processes of the Board dealing with the redress of unfair labor practices and the resolution of representation questions. The "loss of status" clause deals with a separate facet of the renegotiation problem; it deals with "interfering strikes" rather than with "unlawful strikes"; it is complementary to the obligation to maintain without strike the existing working conditions, not repetitive of that obligation.

Congress recognized that the duty to maintain conditions without strike bound not only the contracting labor organization but also the employees as individuals to the extent that the incumbent is bound, for in the sentence dealing with superseding organizations it refers to "The duties imposed upon . . . employees . . . by paragraph(s) . . . 4". As demonstrated in the main brief (RB. 27) Congress repeatedly asserted that no further sanction for violations of this type—unfair labor practices—was necessary. The loss of status clause was necessary to reach conduct which did not amount to an unfair labor practice but which would be equally, if not more, disruptive of peaceful negotiation.

Moreover, there is another inaccuracy in the statement of contention. While it may be true that petitioners became "free to discharge the strikers" (RB. 44-45) it is no part of petitioners' contention under the "loss of status" clause that a discharge was needful to effect the loss of status. (The discharge in this case occurred 30 days after the commencement of the strike.) The loss is automatic, independent of any act of the employer and is available to any party in a representation proceeding or in an unfair labor practice proceeding.

The Board's Findings Are Ambiguous and Self-Contradictory.

2. Respondent's counsel (RB. 45) is insistent on the Board's finding that the strike was "caused and prolonged solely" by the unfair labor practices. Actually the Board's own findings are self-contradictory in this aspect, and ambiguous as to one facet of the situation. It is affirmatively found that the strikers on the day following the calling of the strike demanded the reinstatement of Ciccone as a condition—and the only condition—requisite to a termination of the strike (R. 304). It is clear from the testimony supporting this finding (R. 46) that reinstatement *without prior arbitration* is meant. There was a demand in the pending negotiations that the discharge power be shifted out of the employer and into an arbitrator (Demand 2, Ex. 3, R. 265 in evid., R. 74, relating to change of arbitration clause R. 259 and discharge clause R. 261). Insofar as the strike was prolonged by insistence on a procedure at variance with the existing contract—a procedure then in the negotiation stage only—it cannot be said to have been prolonged "solely" by the unfair labor practices.* That is the contradictory finding.

The ambiguity exists in connection with the "sole causation" finding. The Board finds a series of unfair labor practices which of themselves did not produce a strike plus the unfair labor practice involved in the discharge of Ciccone which, added to the rest, caused the strike. But did the discharge element in the motivation occur because the strikers did not wish—as their ante-strike and post-strike demands indicated—the employer to have the power to dis-

* Had the claim gone to arbitration Ciccone would have been reinstated. He had not in fact violated Maccaferri's order as Maccaferri construed it (R. 316). No question of unfair labor practice would arise under the issue of "proper cause" for discharge (R. 261).

charge at all? It is one thing to say that the discharge of Ciccone was an unfair labor practice and the discharge of Ciccone precipitated the strike, therefore the strike was caused by an unfair labor practice. It is another thing to say that the strikers had demanded that only the arbitrator have the discharge power, that the discharge of Ciccone was an exercise of the discharge power by the employer, that they struck because the employer exercised the discharge power and offered to return if the discharge were rescinded. That is the ambiguous aspect of the finding. It may be said that the ambiguity was resolved according to the pre-Taft Hartley rule of the burden of proof in cases of mixed motivation. But is such a rule to be applied in a case where paramount public interest has dictated abstention from strike?*

It is believed that even the Board would concede that a strike designed to shift the discharge power out of the employer and into an arbitrator would involve a failure to "continue in full force and effect . . . all the terms and conditions of the existing contract. . . ." For the existing contract clearly vested the discharge power in the employer subject to arbitration (R. 261).

A strike is an indivisible event. A strike in renegotiation time is an interfering event. In construing a provision adopted not primarily for the protection of the employer nor primarily for the protection of the employee but primarily for the protection of the public is the Board to be permitted to divide the indivisible interference according to the motive or objective of the interferer? The form of the "loss of status" clause answers this question in the negative. Congress might have provided that the interferer should be denied reinstatement,

* Senator Ball in an extension of remarks (2 Leg. Hist. 1523) identified Section 8(d) as one of two provisions, "aimed primarily at protecting the public". The other was the "national emergency" provision.

allowing to the Board its fact finding leverage and its discretionary functions under Section 10. But it did not so enact; instead, it provided for a complete deprivation of Board jurisdiction over the interfering striker in respect of his claims of unfair labor practices and representation rights. Loss of status goes to the jurisdiction of the Board, and the enactment took that form precisely because Congress wished to prevent the Board from speculative determinations as to strike objectives and motivations in a matter of paramount public interest. Only the simpler determinations of the time of strike, the existence of the contract and the giving of notice were to be left to the Board.

It is hardly a rational construction of a statute which permits the Board to determine whether there has been an unfair labor practice in order to determine whether it had the power to make that determination in the first instance.

The "Loss of Status" Clause Deals With a Separate Facet of Renegotiation.

3. Respondent complains that petitioner "isolates" the "loss of status" clause (R. B. 49). While the statement is untrue in the aspect that petitioner does assert that the clause is organically related to the smooth working of the renegotiation scheme, the statement has this much truth to it; that petitioner does regard the loss of status clause as dealing with a distinct phase of the renegotiation problem. But this later form of "isolationism" is fully justified by the legislative history, for the clause was originally a *proviso* clause in form. S. 1126 as originally reported in the Senate has the substance of the clause as a second proviso at the end of Section 8(d). (1 Leg. Hist. 116). After setting out in a *proviso* clause the obligations of the party taking the lead in terminating or modifying the agreement it is

> "*Provided further*, That any employee who engages in a strike. . . ."

Such phraseology indicates recognition of the fact that the individual employee is a distinct phase of the renegotiation problem.

The bill passed the Senate, as H. R. 3020 without change as to this feature (1 Leg. Hist. 244). The *proviso* form was dropped in the Conference Report (1 Leg. Hist. 513).

The "Inequities" Claimed by Respondent Are Not Sustainable.

4. The catalogue of "incongruous consequences" (RB. 51-53) may be answered as follows:

(a) License to commit unfair labor practices.

An employer acquires no "license". The employee may strike at any time against an unfair labor practice; he has a complete election to adopt what he deems to be the effective remedy.

(b) The "satisfied and dissatisfied union" comparison.

The "rational justification" for differentiating in the treatment of a union in renegotiation lies in the fact that it has added the stress of renegotiation to its relationship with the employer, with its own members and with other unions. While the relationships are under stress, it is completely justifiable to confine the union to the ways of peace, if it desires to pursue them or to exclude the union from the ways of peace if it has chosen war.

(c) The "first contract—renewal contract" comparison.

This point might be simply and completely met by observing that the complaint really is that Congress has failed to legislate completely respecting the full range of evils within the scope of the subject matter.* But to stop with that observation might be to ignore what was, no doubt, a powerful con-

* *Cf.* Labor Board Cases, 301 U. S. 1.

sideration in the Congressional mind in imposing obligations on the parties and employees covered by a contract, namely that they were operating under conditions once mutually agreed upon as satisfactory and with the mutual guarantees of security in their relationships normal in collective contracts. Such contracts include, in most cases, a form of security —job tenure—which destroys in large part the efficacy of unfair labor practices. Under such conditions the imposition of the statutory obligations constituted a relatively light additional burden; but to parties without a contract, such burdens would be more grievous.

Procedural Delay Is No Criterion of Jurisdiction.

5. An argument based on the Board's delays is presented (R. B. 53-54) under the citation of 53 Col. L. Rev. 1023, 1025. A similar argument, rather more soundly based on the equity doctrine of remedial adequacy, received scant support from the Court in *Garner* v. *I. B. T.*, 346 U. S. 483. It is to be noted that "loss of status" goes to the jurisdiction of the Board, as did the question resolved in *Garner*.

The Legislative History Supports Petitioners' Construction.

6. The legislative history argument (R. B. 54-57) calls for a utilization of that material in a novel way. The legislative history is not used to resolve an ambiguity in the statutory language, nor even to show that patently clear language is latently ambiguous. Rather it seems to be called into play in a way reminiscent of the rule said to have been used in the interpretation of the Justinian Code about a century after its promulgation viz. that if there were no gloss on a provision, the provision was presumed to be inoperative. The argument appears to be that since there is nothing in the glosses to show that "any employee" meant "any employee", nor that a temporal standard was

intended, Congress could not have meant what it said. It is respectfully submitted that such a rule is untenable; the best evidence of what Congress intended was what Congress said.

The "loss of status" clause appeared three times in bill form in the course of its passage. It was also a subject of mention in two committee reports. These five expressions of the clause and its effect are set out in Appendix "A" hereto for ready comparison. Both the bill forms and the report forms adhere tenaciously to the universality, to the temporal standard and to the selective exclusion from the remedial advantages of the Act with the presuppositions implied by such exclusion. The less formal expressions in the committee reports dilute in no way the clarity of the statute itself. Congressional debate discloses no dilution; the minority attack on the provision was founded on a literal construction which the sponsors did not question.

There is a significant change emphasizing the concept of temporality between the Senate versions and the final enactment. In the former the phrase "prior to the expiration of (the period)" was used; it was replaced by the phrase "within (the period)." Apparently it was recognized that the former expression could be construed to apply to a time prior to the service of notice of modification, a period when the stressing forces of renegotiation had not been applied to the relationship; for the correction made the clause operative only co-terminously with the renegotiation period. The Committee clearly recognized that time was the test.

So far as the legislative history actually cited by Respondent goes (RB. 54, 55, 56), it supports a proposition of law that is not at all in issue viz. "that (the proviso of) Section 8 (d) is devoted entirely to the orderly functioning of the bargaining process" (RB. 50) but goes no

further. It does not bear at all on the question of whether Congress conceived that one type of strike was more disruptive or less disruptive of peaceful renegotiation than any other type. Respondent does not essay anything more on this issue than the *non-sequitur*, already observed, resting on the premise that only negotiation strikes interfere with negotiation. There is nothing offered to show how an employer can peaceably negotiate on, for example, pensions while his plant is struck for recognition or for claimed unfair labor practices, or for the splitting of a unit.

Suppose the incumbent union's renewal demands include a request for modification of a unilateral pension plan and the employer offers to bargain on all other items but takes the position which the employer took in the *Inland Steel* Case, 170 F. (2nd) 247, cert. den. 336 U. S. 960, viz. that it is not required to bargain on the pension item. Why does not a strike called to secure a commitment to adjust the pension plan disrupt the negotiation as much as a strike called to secure a commitment to advance rates of pay? Is the strike against the unfair labor practice of refusal to bargain less disruptive? On such questions—the real issue—Respondent is silent.

The quoted floor speech of Senator Ball (R. 56) referring to "quickie strikes" was rejected as a limiting factor in the construction of Section 8(d) by the Eighth Circuit in *Local No. 3, United Packinghouse Workers* v. *N. L. R. B.*, 210 F. (2nd) 235, cert. den. 348 U. S. 822. But nothing is shown as to the applicability of the "quickie strike" notion to the specific problem in the case at bar. Does the fact that a strike is a "quickie" negative in some way the involvement—real or contended—of unfair labor practice questions or representation questions? No technical significance appears to attach to the word "quickie".

Harking back to the action of the 74th Congress in enacting the Wagner Act of 1935 (Footnote 29, RB. 58)

Respondent cites the Senate Committee Report reasoning that to hold that an unfair labor practice striker was no longer an employee would be to give "legal sanction to an illegal act." Evidently the 80th Congress reached a conclusion not so sweeping, for its Conference Committee desired some change in the preferred treatment given "unfair labor practice" strikers (H. Conf. Rep't 510 on H. R. 3020, page 49; 1 Leg. Hist. 553; Petrs'. Brief, App., p. 59). The "loss of status" clause expressly withdraws redress for unfair labor practices.

If the general outlook of Congress on the question of which types of strike should be curtailed, is of any importance in resolving this issue (which this counsel doubts), the following attitude of the Senate Committee stated by Senator Taft in introducing S. 1126 is entitled to some weight (2 Leg. Hist. 1007):

> "We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions."

Continuing:

> "We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation."

The colloquy between Senators Ball and Morse (RB. 58) is described in completely misleading fashion. Morse objected to the definition of employee in the Ball bill on two grounds, first, that it permitted an employer simply by hiring strike-breakers to determine the status of strikers; second, that it abolished the distinction between unfair labor practice strikers and others. Ball agreed that his bill went too far without indicating in which aspect it went

too far (2 Leg. Hist. 956-957). No conclusion bearing on the question at bar can be drawn from the colloquy.

The proposal to prohibit strikes to remedy "practices for which an administrative remedy is available" was lumped in the House Bill with eight other prohibitions in a Section (numbered "12") which in three other subdivisions contained six additional prohibitions. Of these fourteen proposals the Conference Committee said, without specification (except in the case of monopolistic strikes), that some were covered by various sections of the Conference Agreement in different form or by existing law (1 Leg. Hist. 562, 563). And that is all the Committee said in that regard. To what extent the "strike to remedy practices for which an administrative remedy is available" appears in Section 8(d) is a question which this bit of legislative history does nothing to resolve. Much more pointed legislative history lies in the hope expressed by the Committee that the *National Silver* case would be overruled (1 Leg. Hist. 537, Petrs'. Brief 52, 53). In any event the rejection of a general measure outlawing strikes for the stated purpose is insignificant on the question whether during a limited time of special stress the normal remedies of such strikers should be withdrawn.

The *Union Mfg. Co.* case (RB. 55) cited for the proposition that unfair labor practice strikers enjoy exemption under the voting procedures of Section 9(c)(3) does not deal with that issue. The stipulation of facts under which the case was tried was to the effect that the strike involved was an economic strike. But even assuming that the proposition of law is true, it has no bearing on the issue at bar for there is no inconsistency in recognizing the superior standing of an unfair labor practice striker in the generality of cases and compelling the victim of an unfair labor practice to elect his remedy by strike or by adjudication when his strike will be an interference with renegotiation.

Respondent's speculations (RB. 60-61) concerning the reason why Congress inserted in the loss of status clause a specification of loss of jurisdiction under Sections 8, 9 and 10 are, in the first place, unsubstantiated by the legislative history. While it is true that Congress was concerned that the *Berkshire Knitting Mills* "minor crimes" doctrine of the Board should stand abrogated, discussions of that subject in the Committee reports do not reveal that Section 8(d) was in any wise involved (1 Leg. Hist. 318, 319, H. R. Comm.; 1 Leg. Hist. 542, 543, H. Conf. Com., 2 Leg. Hist. 1538, 1539, S. Conf.). In the second place, the "loss of status" clause has no direct relation to reinstatement; it operates on the jurisdiction of the Board to entertain an unfair labor practice or a representation proceeding in the case of a terminal period striker.

Most importantly, however, Congress believed (H. Conf. Rept., pp. 38-39, 1 Leg. Hist. 542-543, Petr. Brief, 54-56) that it had met the problem which counsel envisions, viz. that the Board would regard participation in a terminal period strike as a "minor crime" insufficient to bar reinstatement, by the enactment of the "discharge for cause" provision of Section 10(c). It thus was aware that the striker who participated in an economic strike called out of time by the incumbent union—a violation of Section 8(d)(4)—could not be the subject of a reinstatement or back pay order *if discharged by his employer*. If the objective ascribed to Congress by Respondent were the only objective, then there was no need for a further "sanction". But that Congress went further in the much broader terms of the "loss of status" clause—terms broad enough to reach any "interfering strike"—is convincing evidence that it was not merely specifying a superfluous "sanction" but was trying to reach interfering conduct not covered by the remainder of the enactment. In the "loss of status"

clause Congress is dealing with strikes not in terms of whether they are right or wrong, justifiable or inexcusable, fair or unfair but in terms of whether they interfere with the orderly conduct of renegotiation.

An enactment which is jurisdictional, universal, selective and automatic is no inane repetition; it is designed to reach "interfering strikes" whether they be "memorial strikes", "ab' and willing strikes", "production standard strikes", "wildcat strikes", "sympathy strikes", "jurisdictional strikes", "featherbedding strikes", "recognition strikes", "unauthorized strikes" or otherwise. It recognizes only two types of strikes—those which interfere with smooth renegotiation and those which do not.

II.

The "Breach of Contract" Question.

Statistical Information Negatives Respondent's Construction.

1. A large portion of Respondent's brief on the breach of contract question appears to be devoted not to exploring the actual intent of the parties to the agreement but to theorizing, from generic legal principles as to what their intent could have been. It is respectfully submitted that such speculation, divorced from the realities of the bargaining table, is of little weight in construing an obligation universal and unambiguous in its terms.

A much more realistic appraisal of the intent of bargaining parties can be made by observing what parties faced with the problem of bargaining out "no strike" clauses have in fact done. If they have in actual practice and in significant numbers written limitations into "no strike" clauses, the inference is inescapable that an abso-

lute clause is absolute in their minds and requires limitation if limitation is intended.

Analyzing 2,578 collective contracts current *circa* 1951 the Bureau of Labor Statistics* found that 12% contained no work stoppage provisions, 32% contained unconditional bans on work stoppages and 56% contained conditional bans on work stoppages. In the manufacturing industries, of 1,742 contracts, 7% contained no work stoppage provisions, 33% an unconditional ban and 60% a conditional ban. In the cases wherein parties had given evidence of formal consideration of the "no-strike" clause, it is thus seen that roughly two-thirds of the negotiators involved appraised an absolute no-strike clause as so absolute in operation that it required limitation.

In its commentary, the Bureau observes (p. 28):

> "In over a third of the total agreements, work stoppages were permitted for certain specified causes such as: deadlock over the negotiation of changes in the general wage level during the term of the contract; enforcement of compliance with the agreement; refusal of either party to arbitrate or to abide by the decision of the arbitrator; *or a dispute over nonarbitrable issues.* (Emphasis supplied.)

The Bureau further observes (p. 28):

> "In most cases parallel restrictions were imposed on lockouts."

The statistical fact appears to be that when parties intend conditions or limitations on "no strike" undertakings they tend overwhelmingly to express them and not to leave them to implication. If the standard of interpreta-

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* "Labor-Management Contract Provisions, 1950-51" Bull. No. 1091, pp. 28-29.

tion of contractual language be that of the "reasonable man", here we have him—and with a scientifically more solid vertebra than usual in our profession.

Unfortunately the available contract statistics contain no correlation tables tending to show which *quid* is for which *quo*. If such existed, they might enable us to get at another error found *passim* in Respondent's treatment of the contract issue, viz., the error that the "other promises . . . measure the extent to which the parties intended to relinquish recourse to strike or lockout" (RB. 25).

That may well be the rule where the agreement contains no work-stoppage clause whatever, but where the parties have bargained out a no-strike undertaking, the best evidence of their intent is the language which they use to express it. And the best gauge of the language is not to be found on the woolsack but in the market place.

Correction of Reference to Section 13; Applicability.

2. Respondent's reference to Section 13 of the National Labor Relations Act (RB. 21, 22, Footnote 5) is apt to be confusing. With respect to the exceptions "specifically provided for herein" four exceptions are cited. However there are only two in "this Act" i. e. the National Labor Relations Act, viz., Section 8(b)(4) and Section 8(d). There are two other limitations in the "Labor Management Relations Act", viz., Section 206-210 and Section 305. These latter are not exceptions.

It is clear that the amendment of the Section insofar as it added the words "affect the limitations or qualifications on that right (to strike)" had reference to contractual limitations, *inter alia*. The Senate Committee Report (S. Rept. No. 105 on S. 1126, p. 28, 1 Leg. Hist. 434) cites *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 as an instance of a type of limitation recognized in the newly added phrase.

Even under Respondent's "Correlative" Construction Petitioner Prevails.

3. Respondent's argument repeats, in different words the Board error mentioned in Petitioners' Brief (40-42). It is reiterated that the agreement relates to "substantive employment terms" (RB. 26). It should be sufficient rebuttal to call attention to the elaborate "union status" terms of the contract which the Board ignored. The parties had contracted with reference to "union status", wherefore even under the restrictive "correlative" canon of construction employed by the Board, a strike originating in a matter involving "union status" is covered by the "no strike" clause.

Confusion of the Existence of Rights With Their Arbitrability.

4. Respondent's conclusion (p. 27) that "it is not fairly inferrable that the union relinquished the right to strike over a subject for which the contract provided no substitute method of settlement" is based on the unfounded assumption that unless a controversy is arbitrable there is no remedy. An inarbitrable controversy may well be a justiciable controversy or a controversy determinable administratively.

It is not hard to imagine a controversy arising under the contract at bar which would present a question determinable only by the National Labor Relations Board. Suppose some change in the operative procedures of the company occurred which would draw in question the continued propriety of the unit e.g. the installation of a boiler room to provide steam to plasticize materials instead of the machine-unit heating system now employed. The Operating Engineers Union, to which petitioner might have to resort to obtain a licensed high pressure engineer, might claim the employees in the boiler room who, nevertheless would be performing "production" work. The resulting controversy would be determinable only by NLRB; no contract arbitra-

tor could resolve it. Indubitably, however, a strike on such an issue would violate the no-strike clause.

The arbitrability of controversies under a contract cannot be the measure of a no-strike undertaking. To accept it as such leads to the absurdity that no contract is valid without an arbitration clause.*

The opinion in the *Wagner Iron Works* case, quoted at length (RB. 28) rests upon the special language of the contract therein construed and is inapposite here, where there is no language elsewhere in the contract limiting the absolute character of the "no-strike" undertaking.

Reexamination of New York Law.

5. Respondent's attempt to circumvent *Matter of Western Union Telegraph Co.*, 299 N. Y. 177 as controlling authority on the New York Law (RB. 29, Footnote 11) ignores an inescapable inference of the decision. The clause which the arbitrator was held to have modified was the "no-strike" clause itself, which was absolute on its face. There was no "substantive term of employment" relating to "struck traffic" in the contract, and by Respondent's theory, this would have permitted the arbitrator to construe the absolute undertaking of the "no-strike" clause as inapplicable to a refusal to handle "struck traffic". The Court of Appeals necessarily decided that a no-strike clause absolute in form was not limited by the substantive undertakings in the contract but was to be construed by its terms standing alone.

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* Of a sample of 302 contracts examined, effective *circa* 1951, the Bureau of Labor Statistics found that slightly more than 10% had no arbitration provisions. A 1949 study of 1,560 contracts disclosed about 20% without arbitration provisions. Labor-Management Contract Provisions, Bull. No. 1091, B. 25, p. 9.

In the same footnote Respondent refers to *Benedict* v. *Limited Editions Club, Inc.*,* 39 N. Y. Supp. (2nd) 852, 853 (Supreme Court, Appellate Division). As shown above, arbitrability of the controversy is not the criterion for the construction of the "no-strike" clause; the remedies may lie with judicial or administrative bodies. Moreover, the same act may give rise to arbitral rights as well as to administrative remedies, for example, as the Second Circuit conceded, the Ciccone discharge was arbitrable on the issue of "proper cause". It would, no doubt, have been decided in Ciccone's favor (since he did not in fact violate orders his discharge was founded on a mistake of fact (R. 316)) without any reference to the character of the discharge as an unfair labor practice.

The inference which Respondent now seeks to draw from the *Benedict* case is not permissible under Section 13 of the Act. That section might well be paraphrased "Do not construe any limitation or qualification of the right to strike which you find in any contract or in any state law or in any other federal law in the framework of an unfair labor practice". Concretely, a "no strike" clause operates alike on conduct which is an unfair labor practice and on conduct which is not an unfair labor practice. The fact that an arbitrator cannot be vested with jurisdiction to prevent an unfair labor practice does not limit the scope of a no strike clause.

Respondent Ignores the Agreement of the Parties.

6. Respondent's argumentation (RB. 29-35) suggests strongly that it is trying to erect a rule of law under the

* Although the New York Arbitration Law, Civil Practice Act Sec. 1448, has been amended to permit the arbitration of non-justiciable controversies and the NLRA Sec. 10(a) has been amended to omit the word "exclusive", the same result would probably be reached today under the *Garner* doctrine.

mask of a canon of construction in a matter which Congress has designedly reserved for agreement of the parties. Are we henceforth to draft "no strike" clauses in a form resembling a litany of the saints starting with an undertaking to refrain from (or to commit*) unfair labor practices, *co nomine?* No generic form would appear to satisfy the Board. The *Ford Motor* case (RB. 30-31) deals with a no strike clause which, the opinion states, had no effect on the result. The Bureau of Labor Statistics (RB. 32) departs from its function of counting to draw an unmathematical conclusion apparently at variance with its later statistical conclusion that 32 per cent of collective contracts contain unconditional "no-strike" clauses and that of 56 per cent containing conditional no strike clauses only about 40 per cent permitted work stoppages after exhaustion of the grievance procedure.** That would leave 48 per cent of the contracts either unconditional or not conditioned upon the grievance procedure.

The conclusion drawn (RB. 32) from the foregoing "that a pledge not to strike is not a promise dissociated from the remainder of the agreement but has its reason for being in the substantive terms settled by the agreement and in the contractual adjustment process that the agreement creates as a substitute for self-help with respect to contract differences" could as well be said with reference to the implied pledges of contracts which say not a word about abstention from strike. Have the 93 per cent of our manufacturers*** who have labored to secure express commit-

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* The "no-strike" clause in *National Electric Products*, 80 NLRB 995, was honored by the Board because the management had undertaken to commit what was adjudged to be an unfair labor practice.

** Labor-Management Contract Provisions, 1950-51 Bull. No. 1091, Bureau of Labor Statistics, p. 28.

*** Op. Cit. p. 29.

ments to abstain from strike achieved nothing? And have their labor counterparts secured no greater protection against the lockout than if they had never bargained out a no-lockout clause?

Of course it is true that a no-strike clause is not a promise dissociated from the remainder of the contract. But that is not the question here. The question is what the parties agreed to.

The record here shows that the incumbent union demanded a Welfare Plan in 1948, again in 1949 and was reiterating its demand in 1950. A Welfare Plan was thus not one of the substantive terms of employment. It is not mentioned in the contract directly or by any reasonable implication, hence a controversy about such a plan could not be processed through the "contractual adjustment process that the agreement created as a substitute for 'self-help". It had never been in force and hence could not be what the Second Circuit, sensing the inadequacy of its reasoning, vaguely called "the normal day-to-day relations of the parties. Would a strike to put such a plan in force violate the no-strike pledge?

Or suppose the employer in this case instead of contenting himself with mere encouragement of the rival union, Local 318, had in fact locked out all the adherents of the incumbent union during the contract term. Would such a lockout violate the parallel no lockout clause?

The answers to these questions are to be sought not in abstract speculation about the office and function of no-strike clauses but in the words of the specific undertaking.

Cited Cases No Aid to Construction.

7. The cases cited (RB. 32) in support of the proposition that if the employer refuses to arbitrate the union may treat the contract as breached—if it contains an

arbitration clause—establish no more than that the arbitration clause, where it exists, is a substantial term of the contract. They fall short of establishing that, absent an arbitrable controversy, there is no remedy or that absent an arbitrable controversy an unlimited no strike clause is to be limited.

Petitioners' Offer of Proof Does Not Support Respondent's Contention.

8. While it is hardly a fair procedure to reject an offer of proof and then use the offer against a party Respondent's footnote (No. 15, p. 33) will be answered. Simply, the demand for "broad form" arbitration was made and rejected without any concomitant alteration or proposal to alter the no-strike undertaking. Certain changes in the no-strike arrangements were made in the 1949 contract unrelated to the issue. It could have been shown that the union had argued that since the existing (1948) no-strike clause was absolute there should be a concomitant extension of arbitration arrangements. Such bargaining demonstrates that each clause stood on its own feet so far as interpretation is concerned.

Waiver of Right to Strike; Construction.

9. The proposition that waivers of statutory rights must be clear and unmistakable (RB. 34) is fully met by the wording of the no strike clause before the Court. Whether the principle should be applied at all in a case where, in the public interest, consensual derogation of the right to strike is an active aim of the legislation is a question undetermined by this Court. It should be answered in the negative.

Respondent seeks (RB. 35) a showing that the employees have gained in exchange for the waiver a corresponding consideration. The discharge for "proper cause" provision

(R. 261) in the case at bar furnished a broader, quicker and more easily litigated protection with the burden of proof on the employer. Had the complainant union not rejected that contractual protection there would have been a strike of inconsequential duration and no issues pending five years later before this Court.

A Contractual Defense Is Not Barred by the Commission of Unfair Labor Practices.

10. The weakness in Respondent's argument (RB. 35-39) that petitioners should not be allowed to assert as a defense, a strike which was caused by their own unfair labor practices is twofold. First, a strike is not "caused" in the sense in which that term is used in contract law. Between the so-called "cause" and its claimed "effect" there is a wilful act on the part of the striker, a deliberate choice of alternatives. The employer's acts may furnish a "reason" or an "excuse" for a strike, but in no sense do they compel it. Nor in the facts of the case at bar was there any "hindrance" or obstruction to the employee in continuance at work; the Board expressly found to the contrary (R. 323, 340). The acts of the employees were their own acts; though they were posited in response to some act of the employer. There was not even any "clear and present danger" to them; their contract expiration was still twenty days off; the fair voting procedures of the Board could be relied upon to cancel out undue influences at the ballot box; there was no threat of withdrawal of recognition pending the determination of the representation proceeding; Ciccone could have and would have been reinstated quickly had they elected to follow existing contract procedure. The act of striking was their own voluntary act.

Second, as the Board found, the unfair labor practices were not a breach of the agreement (R. 323, 340).

To sustain the Board's position, this Court would have to hold that two wrongs make a right.

Respondent's Misapplications of Section 13.

11. In discussing Section 13, Respondent errs in asserting that the "limitations or qualifications" referred to relate to "limitations or qualifications" in the Act itself. The "limitations or qualifications" refer exclusively to "limitations or qualifications" *dehors* the Act i.e. limitations by contract, by state law or by other federal laws. The sense is that no part of the Wagner Act shall be used to cut down or to enlarge a limitation imposed by contract. The Board appears to have understood this for it disclaimed that it was treating the character of Petitioners' conduct as unfair labor practices as relevant. It said, instead that the "no strike" clause did not by its terms cover any conduct save that specified in the remainder of the agreement. The Board's error lay in failing to compare its findings of fact with the recognition, union security, checkoff and discharge clauses of the contract.

It is not so clear that the Second Circuit understood Section 13, for in rejecting the applicability of the Eighth Circuit's decision in *Local No. 3, UPW* v. *NLRB*, 210 F. (2nd) 235 cert. den. 348 U. S. 822, it said that "perhaps" the fact that there were unfair labor practices in the case at bar would distinguish the cases, indicating its failure to realize that Section 13 made the unfair labor practice issue irrelevant. Its argument to the effect that a waiver of "fundamental rights" protected by the statute would not be inferred in contractual language indicates a like failure.

While the statement of the Second Circuit that Section 13 "presupposes a limitation and has no significance as to whether there is one" is correct, its opinion leaves little doubt that the reason why it found there was no limitation

in this case was that the conduct of Petitioners constituted unfair labor practices.

Respondent also errs in stating that the effect of Section 13 is "entirely neutral" in this situation. Section 13 renders "entirely neutral" Section 8 and all other Sections of the Wagner Act on a question of contractual construction. While it recognizes and preserves the right to strike, it prevents the violation of Section 8 which may have "caused" the strike from becoming material in determining whether a limitation exists.

The Detailed Findings of the Board Control Its Conclusion.

12. Respondent misstates Petitioners' argument demonstrating that the Board's findings of fact relate to subject matters dealt with in the contract by coloring it with the phrase—no part of Petitioners' contention—to the effect that the acts of Petitioners "were therefore subject to the contractual adjustment procedures". Having erected thus a straw man, Respondent knocks him down. As previously demonstrated, the fact that a particular forum cannot be resorted to for a determination of rights, is no index as to the existence of the rights or of their vindicability in other forums.

Nor can the conclusive findings of the Board dispel its detailed findings of fact (RB. 42) which clearly show that the conduct complained of was conduct of a type dealt with in the contract. The Board cannot overrule the Board. It is not contended that all the acts found were arbitrable; it is sufficient for construction of the no-strike clause that the subject matters of the acts were matters of contractual cognizance.

Nor is it of any moment in the construction of the no-strike clause that (RB. 43) the acts, or some of them may have related to a period of time after the contract expira-

tion. A lockout during the contract term to procure a union commitment to a reduction of wages after the expiration of the contract would unquestionably have been a violation. What counts in contractual construction is whether the parties have comprehended the subject matter in their bargain, not whether a particular act is a violation.

Conclusion.

The matter should be remanded with instructions to expunge the reinstatement provisions.

Dated, New York, October 14, 1955.

Respectfully submitted,

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Appendix "A".

Evolution and Variant Expressions of the "Loss of Status" Clause.

1. S. 1126 as reported (1 Leg. Hist. 442)

"Provided further, That any employee who engages in a strike prior to the expiration of the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended,* but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

2. Accompanying Committee Report (S. Rept. No. 105 on S. 1126; 1 Leg. Hist. 430)

". . . Any employee who engages in a strike during the 60-day period would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed. . . .".

3. H. R. 3020 as passed Senate (1 Leg. Hist. 244)

"Provided further, That any employee who engages in a strike prior to the expiration of the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

4. Section 8 (d) N. L. R. A. (1 Leg. Hist. 513)

". . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall

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* As corrected by an omnibus technical amendment substituting "this Act" for "The National Labor Relations Act," 2 Leg. Hist. 1017.

lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.'"

5. Accompanying Committee Report (H. Conf. Rept. No. 510 on H. R. 3020; 1 Leg. Hist. 539)

"An employee who engaged in a strike within the 60-day period just described lost his status as an employee of the particular employer for the purposes of sections 8, 9, and 10 of the act."

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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1954

MASTRO PLASTICS CORP., and FRENCH-AMERICAN REEDS MFG. CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement:	
I. The Board's findings of fact	2
II. The Board's conclusions of law	8
III. The Board's order	9
IV. The decision below	10
Argument	12
Conclusion	18
Appendix	19

CITATIONS

Cases:

S. H. Camp & Co. v. *National Labor Relations Board*, 160 F. 2d 519	15
Local No. 3, United Packinghouse Workers v. *National Labor Relations Board*, 210 F. 2d 325, certiorari denied October 14, 1953	16
National Labor Relations Board v. *Rockaway News Co.*, 345 U. S. 71	18
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384	15

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):	
Section 7	19
Section 8(a)(1)	19
Section 8(a)(2)	19
Section 8(a)(3)	19
Section 8(d)	12-14, 15, 20

Miscellaneous:

93 Cong. Rec. 3839, in 2 Leg. Hist. 1015	15
93 Cong. Rec. 4036, 6503, in 2 Leg. Hist. 1049, 1580	15
93 Cong. Rec. 5014, in 2 Leg. Hist. 1496	15
93 Cong. Rec. 6385, in 1 Leg. Hist. 887	15

Miscellaneous—Continued

Page

H. R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C)(ii), in 1 Leg. Hist. 205-207 16

H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 34-35, in 1 Leg. Hist. 538-539 15

H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 44, 95, in 1 Leg. Hist. 335, 386 16

S. 360, 80th Cong., 1st Sess., Sec. 13(b)(2) (Jan. 27, 1947) 16

S. Min. Rep. No. 105, 80th Cong., 1st Sess., 21-22, in 1 Leg. Hist. 483-484 15

S. Rep. No. 105, 80th Cong., 1st Sess., 24, in 1 Leg. Hist. 430 15

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 454

MASTRO PLASTICS CORP., and FRENCH-AMERICAN REEDS MFG. CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. B1-8) is reported at 214 F. 2d 462. The findings of fact, conclusions of law and order of the Board (B.A. 4-119)[1] are reported at 103 NLRB 511.

JURISDICTION

The decree of the court below was entered on August 19, 1954 (Pet. A1-8). The petition for a

[1] "B.A." references are to the appendix to the Board's brief in the court of appeals; "P.A." references are to the appendix to petitioners' (respondents below) brief in the court of appeals.

writ of certiorari was filed on November 19, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 60-day "waiting period" prescribed by Section 8(d) of the National Labor Relations Act, as amended, applies to employees who engage in a strike, the purpose of which is not to terminate or modify an existing contract but to protest and remedy unfair labor practices committed by the employer.

2. Whether the Board and the court below properly found that the "no-strike" clause in the agreement between the employer and the union in the instant case did not constitute a waiver of the employees' right to strike in protest against unfair labor practices committed by the employer.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 19-22.

STATEMENT

I. The Board's Findings of Fact

Petitioners, although separate corporations, operate within the same plant premises and utilize the services of the same employees and supervisory staff (B.A. 35-36; 124, 160, 191, 249, 250, 256, 295). Mario Maccaferri is president of both companies, and his wife, Maria, is vice president and an active supervisor (B.A. 36; 182, 249-250; P.A. 583). In

1949 and 1950, petitioners' employees were represented for the purposes of collective bargaining by Local 22045, a federal labor union affiliated directly with the American Federation of Labor, hereafter called the Carpenters (B.A. 37; 127-129).[2] The current contract between petitioners and the Carpenters, which was to expire on November 30, 1950, contained the following no-strike and arbitration provisions (P.A. 1004-1015, 1006, 1011, 1014):

> 5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.
>
> * * * * *
>
> 19. DISPUTES:
>
> (a) Should differences arise between either of the Employers and the Union or its members as to the meaning and application of the

[2] Local 22045 and Local 3127, United Brotherhood of Carpenters and Joiners of America, AFL, occupy the same business office and utilize the services of the same representatives (B.A. 36; 126-127). The right to represent petitioners' employees was transferred back and forth between the two unions, usually for reasons not here pertinent (B.A. 36-37, 54-55; 125-129, 144-146). The court below treated the two Locals as a single labor organization (Pet. B-3, n. 1). We shall do the same and refer to them jointly as the "Carpenters."

> provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach of [*sic*] threatened breach of this agreement, such differences may be referred by either party, by giving one (1) week's written notice by registered mail to the other party, to a Conference Committee to settle such matter within one (1) week thereafter, either party may refer the matter to arbitration, as hereinafter provided. * * * The decisions of the Arbitration Board shall be binding upon the parties hereto and may be enforced by appropriate action in a Court of Law and Equity.

In August 1950, Local 65 of the Wholesale and Warehouse Workers Union instituted an organizational campaign among petitioners' employees (B.A. 39; 130, 138-141). Petitioners were opposed to the possible entry of Local 65 into the plant as they considered it to be a Communist-controlled union. They were concerned that Carpenters was not strong enough to cope with the organizational drive of Local 65, and decided to find other means to keep that organization out of the plant. (B.A. 39-40; 132, 250-256, 268.) Accordingly, in September 1950 they sought out Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL (herein called "Paper Workers"), and invited that organization to take over the representation of the employees (B.A. 40; 133-138,

217-219, 251-253, 268; P.A. 785-788). Petitioners first attempted to achieve this result by inducing Carpenters to surrender its bargaining rights to the Paper Workers; if necessary, Carpenters was to be "compensated" for its withdrawal (B.A. 41; P.A. 46-47, 77-78). When Carpenters rejected this proposal, petitioners decided to achieve the desired result by themselves organizing the employees into the Paper Workers. Petitioners selected a committee of employees to visit the office of the Paper Workers to obtain membership cards and instructions for their completion (B.A. 44-45; 154-156, 170-171). Petitioners then directed the members of the committee, and several other employees, to distribute the cards among the workers in the plant during working hours and to have them signed immediately (B.A. 45-49; 156-159, 172-175, 184-187, 205-208, 210-211). Petitioners paid the committee for the time spent on behalf of the Paper Workers, and also paid several other employees for attending a meeting of that organization (B.A. 46, 54; 158-159, 174-175, 232-234, P.A. 343-344). Petitioners' officers and supervisors themselves participated in this organizing campaign, instructing employees to sign cards, and indicating that any who refused could "get out" (B.A. 45, 49-52; 159-162, 172, 175-178, 184-187, 210-212, 229-230, 240-242, 244-245, 265). The campaign quickly achieved its purpose; by October 23 a majority of the employees had signed cards designating the Paper Workers as their bargaining representative (B.A. 52; 129, P.A. 340, 492, 540, 800).

Although the employees had signed cards designating the Paper Workers as their representative under the pressure imposed by petitioners, outside the plant they clearly indicated that their true desires were to remain with the Carpenters. At a series of meetings held by the Carpenters the employees revoked their designations in favor of the Paper Workers and reaffirmed their adherence to the Carpenters (B.A. 54-56; 144-146). They also instructed the bargaining committee to continue to press for a new contract and for certain provisions to be contained therein (B.A. 55; 145-146).

The Carpenters on October 10 had served upon petitioners a letter requesting renegotiation and modification of the existing contract (B.A. 5, 104; 135, 300-301). Petitioners met with the Carpenters' representatives several times and listened to their proposals, but no bargaining concerning the new contract ever took place (B.A. 40-41, 55; 130-133, 145).

Meanwhile, petitioners continued in their efforts to force the employees into the Paper Workers and thereby displace the Carpenters as the bargaining representative. On November 10 the situation reached an explosive climax because of the discriminatory discharge of employee Frank Ciccone. The latter had been employed by petitioners as a machinist and maintenance mechanic for about four and one half years (B.A. 57; 203). He was considered an able and conscientious worker, whose duties required him to go into various departments in the plant to repair machines (B.A. 57; 204, 255, 259). But Ciccone was in the forefront of the

employees who opposed petitioners' attempts to establish the Paper Workers as bargaining agent, was quite outspoken about his views on that subject, and actively engaged in the drive to recruit additional employees into the Carpenters (B.A. 58; 188, 197, 200, 202, 209, 213-216, 218). On November 10, President Maccaferri, who had learned of Ciccone's activities (B.A. 58-59; 189, 216-217, 255), confronted him in the plant and upbraided him for his recruitment of employees into the Carpenters (B.A. 60; 222-223). Maccaferri then ordered Ciccone to remain in the machine shop and not to perform further any maintenance services in other parts of the plant (*ibid.*).

A few hours later, during their customary rest period, Ciccone and four other machinists decided to buy drinks at a Coca Cola vending machine located in a distant portion of the plant (B.A. 61; 190, 223, 270-271). Upon learning that Ciccone had left the machine shop, Maccaferri issued instructions that Ciccone be discharged at once (B.A. 62-63; 267, P.A. 552-553, 690). Ciccone was accordingly discharged and left the plant (B.A. 63; 190-191, 201, 224-226, P.A. 195-196).

A few minutes after Ciccone's discharge the other employees in the machine shop started to walk out in the belief that the dismissal was part of the plan to install the Paper Workers as their representative (B.A. 63; 191-192, 201-202, 226, P.A. 193-194). Word of what had occurred spread rapidly through the plant, and within a short time substantially all the employees had joined the strike. A picket line was set up, and by the follow-

ing morning the plant was completely closed down (B.A. 66, 73-74; 146-147, 149, 163-164, 180-181, P.A. 323-324, 415-416, 430, 466-467, 681-682, 896). During the walkout, and thereafter during the strike, Maccaferri and other supervisors repeatedly threatened employees that they would have to abandon the Carpenters, and accept the Paper Workers, if they hoped to work in the plant again (B.A. 66-73, 78-79; 163-164, 181, 194, 238, 247-248, P.A. 267, 282, 292-293, 313-315, 321-323, 418-419, 426-427, 890). Later, petitioners solicited a number of employees to abandon the strike and return to work, on condition that they accept the substitution of the Paper Workers as their bargaining representative (B.A. 78-79; 194-195, 247-248, P.A. 418-419).

On December 11, 1950, petitioners addressed letters to each of the strikers notifying him that his employment was terminated because he had gone on strike in violation of the no-strike provision in the contract (B.A. 75; 301-302). On March 9, 1951, the Carpenters made an unconditional application for reinstatement of all the strikers (B.A. 77; 152-153, 302). Petitioners did not reply to the request, nor have they reinstated the strikers subsequently found by the Board to have been illegally discharged and denied reinstatement (B.A. 16, 77; 296, P.A. 817-818).

II. The Board's Conclusions of Law

The Board found that petitioners' objective was "to have [the Paper Workers] substituted in the place and stead of [the Carpenters] as bargaining

agent" (B.A. 79). The Board found the proof "overwhelming" that, to this end, petitioners engaged in "unlawful interference with employee self-organizational rights," in violation of Section 8(a)(1) of the Act, and rendered "illegal sponsorship, assistance, and support" to the Paper Workers, in violation of Section 8(a)(2) of the Act (B.A. 79-85, 5, n. 2, 6). The Board also found that in violation of Section 8(a)(3) and (1) of the Act, petitioners discharged employee Ciccone because of his opposition to the Paper Workers and his advocacy of the Carpenters (B.A. 86-89, 6-7). The Board further found that the strike was caused by these unfair labor practices, and prolonged by petitioners' continuing unfair labor practices, and that petitioners, by discharging the strikers and thereafter refusing to reinstate them upon their unconditional request for reinstatement, further violated Section 8(a)(1) and (3) (B.A. 92, 94, 105, 7, 16). The Board rejected petitioners' assertion that the strike was in violation of the no-strike provision of the collective bargaining agreement and also in violation of Section 8(d) of the Act and hence unprotected activity (B.A. 95, 103-107, 7-16).[3]

III. The Board's Order

The Board's order requires petitioners to cease and desist from the unfair labor practices found (B.A. 17-18). Affirmatively, the order directs pe-

[3] Chairman Herzog and Member Murdock, dissenting in part, found merit in the Section 8(d) defense (B. A. 20-24), and in view of this conclusion, Member Murdock found it unnecessary to express an opinion on the contract defense (B. A. 11, n. 9).

titioners to reinstate with back pay Frank Ciccone and 76 named employees who participated in the strike; to withhold all recognition of the Paper Workers unless and until certified by the Board as the bargaining representative; and to post appropriate notices (B.A. 18-19).

IV. The Decision Below

The court below, one judge dissenting, accepted all of the Board's findings of fact and conclusions of law and enforced in full the Board's order (Pet. B2-8). Rejecting petitioners' contention that by engaging in a strike before the expiration date of the contract the employees had violated the no-strike clause and hence were not entitled to the protection of the Act, the court stated that (Pet. B4) "since the strike was caused and prolonged by the [petitioners'] unfair labor practices, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract."

The court also found without merit petitioners' further contention that because the strike occurred less than 60 days after the Carpenters' formal notice to petitioners of an intent to modify the existing contract (*supra*, pp. 6, 7), the employees who struck violated the no-strike provision in Section 8(d)(4) of the Act, and thereby lost their employee status. The court said (Pet. B6-8):

> Section 8(d)(4) of the Act deals with the obligation to bargain collectively in good faith and particularly with the termination or modification of existing bargaining contracts.

> After making provision for procedures looking toward the attainment of such ends, which contain conditions applicable both to employers and employees, a sanction is imposed upon employees as a coercive measure to prevent their use of the strike either to obtain or to prevent the termination or modification of a collective bargaining contract. The "sixty-day period" is a special period during which the status quo ante is to be maintained in respect to employer-employee relationships while the statutory method for bargaining as to existing contracts set up in the subdivision is being used; and a "strike within the sixty-day period" means a strike in interference with the use of that method. In other words, it is tied to the method by the modifying words "within the sixty-day period" and that tie limits the sanction Congress imposed upon the employees involved in the use of the statutory method and excludes strikes which are still protected activities because they are unconnected with the use of the method.

The court concluded, therefore, that since the strike here "was caused solely by the unfair labor practices" of the petitioners, "and was not motivated by any purpose so to obtain any economic advantage by way of contract modification", Section 8(d) was not applicable, leaving the employees with the full protection which the Act affords unfair labor practice strikers (Pet. B6).

ARGUMENT

1. The strike in the instant case, as the Board and the court below found, and petitioners do not deny, "was caused solely by the unfair labor practices of [petitioners] and was not motivated by any purpose so to obtain any economic advantage by way of contract modification" (Pet. B6; see also B.A. 104-105). The court below correctly concluded that Section 8(d) has no application to such a strike. Petitioners, however, isolating the concluding sentence of Section 8(d) from its context, assert that the 60-day waiting period provided in that section applies to any strike without regard to whether the strike is for the purpose of protesting and remedying unfair labor practices or for advancing contract demands. This contention, as the court below held, manifestly fails to give "due consideration" to the language of Section 8(d) "as a whole," and to the Congressional purpose reflected in the Section and confirmed by its legislative history.

Analyzing Section 8(d) paragraph by paragraph, it is evident that the section is devoted entirely to the orderly functioning of the bargaining process. Dealing first with the general elements of the duty to bargain, it next specifies the particular requirements applicable to a "party desiring * * * termination or modification" of an existing agreement. Sixty days' notice of the "proposed termination or modification" must be given; an offer to meet and confer "for the purpose of negotiating a new contract or a contract contain-

ing the proposed modifications" must be made; and if no agreement is reached within thirty days, notice of the existence of the dispute must be given to federal and state conciliators and mediators. And in order that these procedures may have a fair chance to succeed, all the "terms and conditions of the existing contract" must for the sixty-day period of the notice remain "in full force and effect, without resorting to strike or lock-out." The Section further provides that "the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification" of a contract for a fixed period, if "such modification is to become effective" before the contract under its provisions can be reopened. Finally, Section 8(d) concludes with a provision that "Any employee who engages in a strike within the sixty day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of the Act * * *."

It is plain that Section 8(d), so far as here pertinent, prohibits a strike or lockout for sixty days, and causes a forfeiture of employee status of strikers who participate in a strike during that period, only when recourse to strike action is for the purpose of effecting changes in existing contract terms. The statutory scheme is based on the hope that a sixty-day period of uninterrupted negotiation, with the help where necessary of federal and state conciliators, will produce agreement without the need for recourse to industrial strife. And

so the statute enjoins resort to a strike by a union or a lockout by an employer to compel either party to accede to the contract demands of the other before the expiration of the sixty days allotted to effecting agreement without self-help.

To give the prohibition against strikes or lockouts in Section 8(d) greater scope than this and make it applicable to unfair labor practice strikes leads to consequences so incongruous that it cannot reasonably be inferred that Congress meant to require them. As the court below pointed out (Pet. 37), such a reading of the Act would attribute to Congress

> * * * the intent not merely to provide for an orderly way to terminate or modify existing collective bargaining agreements but the intent both to give an employer, by taking advantage of the method, an opportunity to indulge in unfair labor practices which employees would, perhaps, find it to hazardous to resist quickly and effectively by means of a strike, and to require employees, who used the method, to do so on pain of giving the employer just such an opportunity. It would discriminate, in respect to the right to resist unfair labor practices by striking, between employees working under a collective bargaining contract and those who were not and between unions who were satisfied with such existing contracts and those who were not. And it would penalize the latter for attempting lawfully to remedy their condition

by peaceful bargaining. In view of the well known purpose of the Act to prevent industrial strife, such an intent should not be attributed to Congress until, and unless, it sees fit to say so in clear and uncertain terms.

The legislative history confirms what is clear on the face of Section 8(d), namely, that the Section has no application to strikes called to protest and remedy unfair labor practices, but is designed instead to provide an orderly method for negotiating successor agreements.[4] Indeed, Congress specifically rejected a proposed amendment which would have prohibited "any strike or other concerted interference * * * to remedy practices for which an administrative remedy is available" and would have deprived employees engaging in such activity

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[4] S. Rep. No. 105, 80th Cong., 1st Sess., 24, in 1 Leg. Hist. 430; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 34-35, in 1 Leg. Hist. 538-539; see also, 93 Cong. Rec. 3839, in 2 Leg. Hist. 1015; 93 Cong. Rec. 5014, in 2 Leg. Hist. 1496.

To support the view that Section 8(d) prohibits an unfair labor practice strike during the 60-day period of notice, reliance is placed (Pet. 16, C15-16; B8) on statements of the opponents of the 1947 amendments to the Act, not specifically controverted by the proponents, to the effect that "provocative conduct" by the employer during this period must be countenanced without "resort to self-help" and is to be dealt with through a Board order to "'cease and desist' from such practices." S. Min. Rep. 105, 80th Cong., 1st Sess., 21-22, in 1 Leg. Hist. 483-484; 93 Cong. Rec. 6385, in 1 Leg. Hist. 887; 93 Cong. Rec. 4036, 6503, in 2 Leg. Hist. 1049, 1580. However, "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394; *S. H. Camp & Co. v. National Labor Relations Board*, 160 F. 2d 519, 521 (C. A. 6), and cases cited.

of "rights under the Act"—a proposal which would have cut down the right to strike, as here, against unfair labor practices.[5]

Contrary to petitioners' assertion, the decision of the Eighth Circuit in *Local No. 3, United Packinghouse Workers* v. *National Labor Relations Board*, 210 F. 2d 325, certiorari denied October 14, 1954, No. 124 this Term, is not inconsistent with the ruling below. The strike in that case was not, as here, an unfair labor practice strike; this fact, as the court below pointed out (Pet. B8), "serves to distinguish that case from this * * *." There, the employees struck to obtain a change in the current contract, the very situation Congress had in mind in enacting Section 8(d). The court held that economic strikers lost their status as employees by engaging in a strike before the expiration date of an existing contract even though the strike did not occur until 60 days after the giving of notice required by Section 8(d).

2. Petitioners further contend (Pet. 19-24) that the Board and the court below erred in concluding that (opinion below, Pet. B-4) "since the strike was caused and prolonged by the [petitioners'] unfair practices, * * * it is not prohibited by the strike-waiver clause in the contract." This argument raises merely a question as to the interpretation of the particular agreement in the instant

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[5] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C)(ii), in 1 Leg. Hist. 205-207; S. 360, 80th Cong., 1st Sess., Sec. 13(b)(2) (Jan. 27, 1947). See also H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 44, 95, in 1 Leg. Hist. 335, 386.

case, and as petitioners acknowledge (Pet. 19), "Normally, the question of whether particular conduct violates specific contractual commitments is too ephemeral a question to justify review by this Court." This statement of what is "normally" true is precisely applicable here. Moreover, the ruling of the Board and the court below, construing petitioners' contract with the Carpenters, is clearly correct.

Viewing the contract as a whole, it is evident that, as the court below held (Pet. B4-5), the inhibition imposed by the no-strike agreement "is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties." The parties specified the substantive terms governing the employment relationship and bound themselves to abide by those terms for the duration of the agreement; the no-strike, no-lockout provision was a guarantee that there would be no resort to self-help to effect any change in the agreed terms during their life or to achieve any advantage sought in the normal day-to-day relations between the parties. Correlatively, since differences inevitably arise in the administration of any agreement, the parties also agreed upon binding arbitration as a peaceful means of adjusting such disputes; the no-strike, no-lockout provision guaranteed that there would be no stoppage over matters subject to arbitration. However, as the court below stated (Pet. B-5), "Unfair labor practices were in no way covered by the contract nor did the contract provide means for combating them

or settling disputes arising because of them."[6] As to such unlawful conduct by the employers (and petitioners do not question the findings of flagrant unfair labor practices on their part), the Carpenters nowhere relinquished the right to strike.

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER 1954.

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[6] After the Board's decision and order herein was issued, petitioners attempted to introduce further evidence concerning certain proposals made by the Carpenters during negotiation of the 1949 contract (Pet. B8). One of these proposals which petitioners would not accept was that "all disputes, whether or not arising from contract be referred to arbitration" (P. A. 1026). Petitioners' rejection of this proposal, instead of fortifying their position, suggests that the parties themselves contemplated an area of dispute which would not be covered by the contract terms, and in which resort to strike would therefore be permissible (Pet. B4-5). Cf. *National Labor Relations Board* v. *Rockaway News Co.*, 345 U. S. 71, 79-80.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage membership in any labor organization: * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employes in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract

for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

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Office - Supreme Court, U. S.
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HAROLD B. WILLEY, Clerk

No. 19

In the Supreme Court of the United States

October Term, 1955

MASTRO PLASTICS CORP., AND FRENCH-AMERICAN REEDS MFG. CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
I. The Board's findings of fact	2
A. Petitioners' attempt to replace the Carpenters with another labor organization of their choice	4
B. The discriminatory discharge of Frank Ciccone on November 10	6
C. The employees' strike in protest against petitioners' unfair labor practices	8
D. Petitioners' discharge of the strikers and refusal to reemploy them upon their unconditional application	10
II. The Board's conclusions of law	12
III. The Board's order	14
IV. The decision below	14
Summary of argument	17
Argument	21
I. The Board and the court below properly found that the "no-strike" clause in the agreement between petitioners and the Carpenters did not constitute a waiver of the employees' right to strike in protest against petitioners' unfair labor practices	21
II. Section 8(d) of the Act does not apply to employees who engage in a strike, the purpose of which is not to terminate or modify an existing collective bargaining contract but to protest against the employer's unfair labor practices	44
Conclusion	62
Appendix	63

CITATIONS

Cases:

	Page
Aluminum Co. of America, 7 Lab. Arb. Rep. 442	30
Armour & Co., 8 Lab. Arb. Rep. 758	30
Atlas Trading Corp. v. S. H. Grossman, Inc., 169 F. 2d 240	36
Benedict v. Limited Editions Club, Inc., 39 N.Y. Supp. 2d 852	29
Boeing Airplane Co. v. Aeronautical Industrial Lodge, 91 F. Supp. 596, affirmed, 188 F. 2d 356, certiorari denied, 342 U.S. 821	33
Brynmore Press, Inc., 7 Lab. Arb. Rep. 648	30
S. H. Camp v. National Labor Relations Board, 160 F. 2d 519	57
Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197	22
Joseph Dyson & Sons, Inc., 72 NLRB 445	22, 24
Ford Motor Co., 6 Lab. Arb. Rep. 799	26, 30
General Teleradio, Inc., 18 Lab. Arb. Rep. 418	30, 33
C. G. Hussey & Co., 7 Lab. Arb. Rep. 590	30
Local 1111, U.E.R. & M.W. v. Allen-Bradley Co., 255 Wis. 613, 39 N.W. 2d 740	32
National Electric Products Corp., 80 NLRB 995	22
National Labor Relations Board v. Bell Aircraft Corporation, 206 F. 2d 235	43
National Labor Relations Board v. Crosby Chemicals, Inc., 188 F. 2d 91	34
National Labor Relations Board v. General Motors Corporation, 116 F. 2d 306	43
National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665	40, 41
National Labor Relations Board v. Item Co., 220 F. 2d 956, petition for certiorari pending, No. 216, this Term	34
National Labor Relations Board v. Kobritz, 193 F. 2d 8	34
National Labor Relations Board v. Otis Elevator Co., 208 F. 2d 176	34
National Labor Relations Board v. Remington Rand, Inc., 130 F. 2d 919	35

Cases—Continued

	Page
National Labor Relations Board v. *UAW, Local 291*, 194 F. 2d 698	43
National Labor Relations Board v. *Wagner Iron Works*, 220 F. 2d 126, petition for certiorari pending, No. 185, this Term	25, 28, 34, 35, 51
National Labor Relations Board v. *Walt Disney Productions*, 146 F. 2d 44, certiorari denied, 324 U.S. 877	43
National Labor Relations Board v. *Washington-Oregon Shingle Weavers' District Council*, 211 F. 2d 149	34
National Labor Relations Board v. *West Coast Casket Co.*, 205 F. 2d 902	35
Patterson v. *Meyerhofer*, 204 N.Y. 96, 97 N.E. 472	36
Peck v. *Jenness*, 7 How. 611	50
Philadelphia Marine Trade Ass'n v. *ILA*, 34 LRRM 2087	30
Porto Rico v. *Title Guaranty and Surety Co.*, 227 U.S. 382	37
Radio Corp. v. *United States*, 341 U.S. 412	42
Rheem Mfg. Co., 8 Lab. Arb. Rep. 85	30
M. H. Ritzwoller Co. v. *National Labor Relations Board*, 114 F. 2d 432	34
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384	57
Scullin Steel Company, 65 NLRB 1294	22, 24
Simplicity Pattern Co., 7 Lab. Arb. Rep. 180	30
Singer Mfg. Co., 24 NLRB 444	22
R. H. Stearns Co. v. *United States*, 291 U.S. 54	38
Stevens v. *Howard D. Johnson Co.*, 181 F. 2d 390	36
Stockstrom v. *Commissioner of Internal Revenue*, 190 F. 2d 283	38
Textile Workers Union v. *Aleo Mfg. Co.*, 94 F. Supp. 626	25
Tradewell Foods, Inc. v. *New York Credit Men's Adjustment Bureau*, 179 F. 2d 567	36
Union Mfg. Co. v. *National Labor Relations Board*, 221 F. 2d 532, certiorari denied, 349 U.S. 921	59

Cases—Continued

	Page
United Automobile Workers v. *O'Brien*, 339 U.S. 454	41
United Automobile Workers v. *Wisconsin Employment Relations Board*, 336 U.S. 245	40
United Electrical, etc. Workers v. *National Labor Relations Board*, 223 F. 2d 238, petition for certiorari pending, No. 343, this Term	37
United States v. *Boisdore's Heirs*, 8 How. 113	50
United States v. *Peck*, 102 U.S. 64	37
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	42
Vanadium Corp. of America v. *Fidelity & Deposit Co.*, 159 F. 2d 105	36
Western Union Telegraph Co., Matter of, 299 N.Y. 177, 86 N.E. 2d 162	29

Statutes:

Labor Management Relations Act, 61 Stat. 136:	
Secs. 206-210	22
Sec. 305	22
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*):	
Section 7	63
Section 8	60
Section 8(a)(1)	63
Section 8(a)(2)	63
Section 8(b)(4)	22
Section 8(a)(3)	63
Section 8(d)	20, 21, 22, 44, 46-49, 50, 51, 60, 61, 64
Section 9	60
Section 9(a)	66
Section 9(b)	66
Section 9(c)(1)	67
Section 9(c)(3)	59, 68
Section 10	60
Section 10(a)	68
Section 10(c)	68
Section 13	21, 40

Miscellaneous:

	Page
Annotation, 2 A.L.R. 2d 1278	33
Bull. No. 908-13, U.S. Dept. of Lab., Bur. Lab. Stat., p. 1 (1949)	31
Bull. 908-19, U.S. Dept. of Lab., Bur. Lab. Stat., p. 35 (1950)	56
53 Col. L. Rev. 1023, 1025	39, 53
93 Cong. Rec. 1827-1828, 2 Leg. Hist. 956-957	58
93 Cong. Rec. 3839, 2 Leg. Hist. 1015	55
93 Cong. Rec. 4036, 6503, 2 Leg. Hist. 1049, 1580	57
93 Cong. Rec. 5014, 2 Leg. Hist. 1496	56
93 Cong. Rec. 6385, 1 Leg. Hist. 887	57
93 Cong. Rec. 6442, 2 Leg. Hist. 1539	23
Corbin on *Contracts:*	
Sec. 571	36
Sec. 770	36
Sec. 944	36
Sec. 947	36
Sec. 1264	36
Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274 (1948)	32
21 Geo. Wash. L. Rev., *The No-Strike Clause*, 127	27
H.R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. 158	59
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 1 Leg. Hist. 505	23, 40, 54, 61
House Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. 292	59, 61
McCabe, *Machinery for the Adjustment of Disputes Under New Collective Agreements*, 5 Law & Contempt Prob. 261 (1938)	31
Peterson, *Settlement of Grievances Under Union Agreements*, 50 Monthly Lab. Rev. 286 (1940)	31
3 President's Natl. Lab.-Man. Conf. 140 (1945)	31
Restatement, Contracts §§ 295, 315, 317	36
S. 360, 80th Cong., 1st Sess., Secs. 2(b), 13(b) (January 27, 1947)	58
S. Rep. No. 105, 80th Cong., 1st Sess., 1 Leg. Hist. 407	54

Miscellaneous—Continued

	Page
S. Min. Rep. No. 105, 80th Cong., 1st Sess., 1 Leg. Hist. 463	57
Senate Report No. 573 on S. 1958, 74th Cong., 1st Sess. (1935), pp. 6-7	58
Shulman and Chamberlain, *Cases on Labor Relations* (1949)	26, 43
Williston, *Contracts* §§ 677, 887A (Rev. Ed. 1936)	36

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 364-370) is reported at 214 F. 2d 462. The findings of fact, conclusions of law and order of the Board (R. 266-337, 339-360) are reported at 103 NLRB 511.

JURISDICTION

The decree of the court below was entered on August 19, 1954 (R. 371-376). The petition for a writ of certiorari was filed on November 19, 1954,

and was granted on January 10, 1955 (348 U. S. 910). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board and the court below properly found that the "no-strike" clause in the agreement between the employer and the union in the instant case did not constitute a waiver of the employees' right to strike in protest against unfair labor practices committed by the employer.

2. Whether the 60-day "waiting period" prescribed by Section 8(d) of the National Labor Relations Act, as amended, applies to employees who engage in a strike, the purpose of which is not to terminate or modify an existing contract but to protest and remedy unfair labor practices committed by the employer.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 63-69.

STATEMENT

I. The Board's Findings of Fact

Petitioners, although separate corporations, operate within the same plant premises and utilize the services of the same employees and supervisory staff (R. 270; 1-2, 88, 117-118, 196-197, 209, 237). Mario Maccaferri is president of both companies, and his wife, Maria, is vice president and an active supervisor (R. 270; 109, 196-197). In 1949 and

1950, petitioners' employees were represented for purposes of collective bargaining by Local 22045, a federal labor union affiliated directly with the American Federation of Labor, hereafter called the Carpenters (R. 271-272; 9-10).[1] The current contract between petitioners and the Carpenters, which was to expire on November 30, 1950, contained the following no-strike and arbitration provisions (R. 273; 13, 255, 259-260, 262):

> 5. The Union agrees that during the term of this agreement there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.
>
> 6. The Employers agree that there shall be no lockout during the term of this agreement.
>
> * * * * *
>
> 19. Disputes:
>
> (a) Should differences arise between either of the Employers and the Union or its mem-

[1] Local 22045 and Local 3127, United Brotherhood of Carpenters and Joiners of America, AFL, occupy the same business office and utilize the services of the same representative (R. 271-272; 3-5, 7-8). The right to represent petitioners' employees was transferred back and forth between the two unions, usually for reasons not here pertinent (R. 271-272; 11-12, 37-38). The court below treated the two Locals as a single labor organization (R. 365, n. 1). No issue in this case is affected by treating the two as one organization and, accordingly, we refer to them jointly as the "Carpenters."

bers as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement, such differences may be referred by either party, by giving one (1) week's written notice by registered mail to the other party, to a Conference Committee to settle such matter within one (1) week thereafter, either party may refer the matter to arbitration, as hereinafter provided. [sic] * * * The decisions of the Arbitration Board shall be binding upon the parties hereto and may be enforced by appropriate action in a Court of Law and Equity.

A. *Petitioners' attempt to replace the Carpenters with another labor organization of their choice*

In August 1950, Local 65 of the Wholesale and Warehouse Workers Union instituted an organizational campaign among petitioners' employees (R. 274; 13). Petitioners were opposed to the possible entry of Local 65 into the plant as they considered it to be Communist-controlled. They were concerned that Carpenters was not strong enough to cope with the organizational drive of Local 65, and decided to find other means to keep that organization out of the plant (R. 274; 15-17, 197-204). Accordingly, in September 1950 they sought out Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL, herein called the

Paper Workers, and invited that organization to take over the representation of the employees (R. 274-275; 17-26, 142-144, 197-198, 224-225). To achieve this result, petitioners first sought to induce Carpenters to transfer its bargaining rights to the Paper Workers; if necessary, Carpenters was to be "compensated" for its withdrawal (R. 275-277; 33-35). When Carpenters rejected this proposal, petitioners decided to achieve the desired result by themselves organizing the employees into the Paper Workers. They selected a committee of employees to visit the office of the Paper Workers to obtain membership cards and instructions for their completion (R. 278-280; 82-86, 98-102). Petitioners then directed the members of the committee, and several other employees,[2] to distribute the cards among the workers in the plant during working hours and to have them signed immediately (R. 280-281; 86-88, 99-102, 111-113, 132-138). Petitioners paid the committee for the time spent on behalf of the Paper Workers, and also paid several other employees for attending a meeting of that organization (R. 280, 287; 86-87, 102-103, 160-161, 175-176). Petitioners' officers and supervisors themselves participated in this organizing campaign, instructing employees to sign cards, and indicating that any

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[2] Among them was a machinist named Frank Ciccone, whose later discriminatory discharge became "the spark which set off the strike," discussed below (pp. 6-10). At this time, however, in order to gain Ciccone's cooperation, President Maccaferri suggested to Ciccone that there was a good possibility that the latter would be promoted to a position as a foreman (R. 281, 135).

who refused could "get out" (R. 280, 281-282, 283-284; 88-89, 100, 104-105, 111-113, 136-137, 153-154, 177-181, 189-190, 216-218). The campaign quickly achieved its purpose; by October 23 the Paper Workers obtained membership application cards from a majority of the employees (R. 285; 10, 201).

Although the employees had signed these cards under the pressure imposed by petitioners, outside the plant they clearly indicated that they wished to remain with the Carpenters. At a series of meetings held by the Carpenters the employees revoked their membership applications in favor of the Paper Workers and reaffirmed their adherence to the Carpenters (R. 287-288; 37-40). They also instructed the bargaining committee to continue to press for a new contract and for certain provisions to be contained therein (R. 287-288; 40).

Meanwhile, the Carpenters on October 10 had written to petitioners, requesting renegotiation and modification of the existing contract (R. 328, 348; 23-25, 263). Petitioners met with the Carpenters' representatives several times and listened to their proposals, but no agreement was reached (R. 275, 288, 289; 14-15).

B. *The discriminatory discharge of Frank Ciccone on November 10*

At this stage, as the Board found, petitioners discharged employee Frank Ciccone for his advocacy of the Carpenters.

Ciccone had been employed by petitioners for about 4½ years prior to his discharge on November

10, 1950, as a machinist and maintenance mechanic (R. 289-290; 131). His work required him to go into the various departments of the plant to repair machines (R. 290; 131). Ciccone's foreman considered him an able and conscientious worker (R. 290; 204, 212-213).

As noted above, p. 5, n. 2, Ciccone had been requested by Maccaferri to participate in the organization campaign initiated by petitioners on behalf of the Paper Workers. However, Maccaferri's interest in the Paper Workers disturbed Ciccone, and he openly expressed his concern on this point on several occasions (R. 290; 127, 136-137, 140, 144). Ciccone was in the forefront of those critical of the attempt to bring "the boss' union" into the plant and thereafter undertook to recruit additional employees to join the Carpenters (R. 290; 125, 139-142). He carried on his organizational activities during lunch and rest periods, and before and after working hours (R. 290; 115, 130, 141-142). Admittedly, Maccaferri soon became aware of these activities (R. 291; 116, 142, 204).

At about 1 p. m. November 10, Maccaferri approached the bench in the machine shop where Ciccone was working, and upbraided him for his recruitment of employees into the Carpenters (R. 292; 147). Maccaferri then ordered Ciccone to remain in the machine shop and not to perform further any maintenance services in other parts of the plant (*ibid.*).

A few hours later, during their customary rest period, Ciccone and four other machinists decided

to buy drinks at a Coca-Cola vending machine located in a distant portion of the plant (R. 293-294; 116-117, 147-148, 226). Upon learning that Ciccone had left the machine shop, Maccaferri issued instructions that Ciccone be discharged at once (R. 294-295; 206, 210, 219). Ciccone was accordingly discharged and left the plant (R. 295; 117-118, 128-129, 149-150).[3]

C. *The employees' strike in protest against petitioners' unfair labor practices*

Within ten minutes after Ciccone's discharge, the machine shop employees walked out on strike (R. 295; 118, 150), acting on the belief that Ciccone was discharged because Maccaferri desired to impose the Paper Workers on the employees (R. 297; 118, 129-130).

Word as to what had happened in the machine shop spread rapidly through the plant (R. 297; 91-92, 108-109). The men in the buffing room of the finishing department (R. 298; 172-173), all but three of the girls in the ukelele room of the finishing department (R. 299; 172-173, 181-182, 188, 195), and about three or four packing room employees (R. 299; 155-156, 157), also walked out to protest Ciccone's discharge. The next day, since all but a handful of employees had joined the strike, the plant was completely shut down (R. 304; 46).

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[3] Foreman Studli, who notified Ciccone of his dismissal, when asked by the latter for the reason for this action expressed the opinion that it was for union activity (R. 295; 117, 129, 149).

On the day of Ciccone's discharge, Foreman Ritacco told three employees that Ciccone had been discharged because of his activities on behalf of the Carpenters and that anyone else who went along with that union could expect like treatment (R. 297, 301; 92, 109, 164-165). Forelady Zwobodar told the ukelele room employees that Ciccone had been fired for his union activities; that the machine shop employees who had walked out in protest had also been discharged; and, to dissuade the ukelele room employees from joining the walkout, she told them that Maccaferri wanted the Paper Workers, that they could expect their demands to be met only through that union, and that to go along with the Carpenters and join the strike meant discharge under the contract (R. 299; 171, 184-185). In the packing room, directly supervised by Mrs. Maccaferri, the latter told an employee, "Frank [Ciccone] is not here no more. He's just been fired for making trouble with [the Carpenters]. And if anybody else starts the same thing, they'll be going just like him" (R. 300; 155, 156-157). At the close of the shift, Mrs. Maccaferri spoke informally to the employees as they were leaving, urging them not to join the strike, expressing her husband's determination to see the Paper Workers become the employees' bargaining representative in the plant, and indicating it would be foolhardy and useless for the employees to oppose her husband's wishes (R. 300-301; 158). Finally, addressing the night shift employees of the moulding department who had reported to work before the picket line was formed,

Maccaferri expressed his approval of the Paper Workers and his opposition to the Carpenters, and stated that before he would deal with the latter he would close the plant (R. 302-304; 165, 168-169, 192).

D. *Petitioners' discharge of the strikers and refusal to reemploy them upon their unconditional application*

The day after the strike began, the Carpenters' attorney and business agent, Abraham Saul, urged Maccaferri to put Ciccone back to work, but Maccaferri refused stating that Ciccone was "no damn good" (R. 304-305; 45-46). Maccaferri later repeated that he wanted nothing further to do with Ciccone, nor with seven or eight other named employees prominent in Carpenters' activities (R. 305).

The plant remained closed until December 11, 1950, when employee O'Neill, who had been most active on behalf of the Paper Workers (R. 278-280; 82-86, 98-102), having organized a back-to-work movement, induced 16 employees to report for work; they were reinstated upon their application (R. 305; Tr. 602, 1135). On the same day, petitioners addressed a form letter to other employees, effecting their discharge (R. 305; 51, 264):

> We do hereby advise you that due to your breach of contract with us, which did not expire until November 30, 1950, by going out on strike on November 10, 1950, in violation of the

provisions of the contract, we have terminated your employment with this corporation.

On March 9, 1951, by registered letter, the Carpenters made an unconditional application for reinstatement on behalf of all the striking employees (R. 307; 53-54, 265). Petitioners did not reply to this request, nor have they reinstated any of the strikers named in the Board's order (R. 307; 238). Before the unconditional application for reinstatement, petitioners had reinstated seven strikers in addition to the previous sixteen, and had also hired a substantial number of replacements (R. 307). After the unconditional application, petitioners hired numerous new employees instead of recalling the strikers (R. 307).

After the strike began and before the unconditional application for reinstatement, petitioners solicited strikers to return to work upon condition that they abandon the Carpenters. Maccaferri invited one employee to return to work on that condition, stating that his discharge would be rescinded if he were willing to give up the Carpenters (R. 307; 120); about Christmas, 1950, Maccaferri told several pickets, "Why don't you fellows get smart to yourself and come back to work and forget about [Carpenters], and I will give you back your Christmas bonus" (R. 307-308; 193); on another occasion, Maccaferri told several pickets that he would never sit down with the Carpenters, but if they wanted to return to work they could do so, provided they forgot about that organization (R. 308; 183); and

at still another time an employee similarly was urged by Maccaferri to forget about the Carpenters and to return to work (R. 308; 184).

II. The Board's Conclusions of Law

The Board found that petitioners' objective was "to have [Paper Workers] substituted in the place and stead of [Carpenters] as bargaining agent" (R. 309). The Board found the proof "overwhelming" that, to this end, petitioners engaged in "unlawful interference with employee self-organizational rights," in violation of Section 8(a)(1) of the Act. (R. 308-309). More specifically, the Board found that in violation of their statutory duty petitioners had engaged in the following acts of interference, restraint and coercion (R. 313, 341):

> (a) inducing and encouraging the representatives of [Carpenters] to agree to substitute [Paper Workers] in its place and stead; (b) inducing and encouraging the representatives of [Paper Workers] to engage in a campaign to displace [Carpenters] as the bargaining agent of their employees; (c) sponsoring, supporting and assisting the organizational campaign of [Paper Workers]; (d) giving financial rewards to employees active in the organizational campaign of [Paper Workers]; (e) inducing employees by threats, warnings of reprisal, and promises of benefit to become and remain members of other competing unions; (f) making abandonment of membership in or activities on behalf of [Carpenters] a condition of continued or new employment, after

> the start of the strike; and (g) soliciting employees engaged in picketing and other strike activities on behalf of [Carpenters] to abandon such activities, and promising benefits to induce them to do so.

The Board also found that, in violation of Section 8(a)(3) and (1) of the Act, petitioners discharged employee Ciccone because of his opposition to the Paper Workers and his advocacy of the Carpenters (R. 314-317, 341-342). The Board further found that the strike was caused by these unfair labor practices, and prolonged by petitioners' continuing unfair labor practices, and that accordingly petitioners, by discharging the strikers and thereafter refusing to reinstate them upon their unconditional request for reinstatement, further violated Section 8(a)(1) and (3) (R. 319, 331, 342, 350). Finally, the Board found that by the foregoing conduct, petitioners had rendered "illegal sponsorship, assistance, and support" to Paper Workers, in violation of Section 8(a)(2) of the Act (R. 308, 313, 341).

The Board rejected petitioners' assertion that the strike was in violation of the no-strike provision of the collective bargaining agreement and also in violation of Section 8(d) of the Act and hence unprotected activity (R. 319-331, 342-350).[4]

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[4] Chairman Herzog and Member Murdock, dissenting in part, found merit in the Section 8(d) defense (R. 353-356), and in view of this conclusion, Member Murdock found it unnecessary to express an opinion on the contract defense (R. 345, n. 8).

III. The Board's Order

The Board's order requires petitioners to cease and desist from (1) encouraging or discouraging membership in any labor organization by discrimination in employment, (2) discriminating in employment for the reason that employees have engaged in strike or other protected concerted activities, (3) sponsoring, assisting, or supporting any labor organization to become collective bargaining representative of their employees, and (4) in any other manner abridging the employees' exercise of the rights guaranteed them by Section 7 of the Act (R. 350-351). Affirmatively, the order directs petitioners (1) to reinstate Frank Ciccone and 76 named employees with back pay, (2) to withhold all recognition of Paper Workers unless and until certified by the Board as the bargaining representative, and (3) to post appropriate notices (R. 351-353, 357-360).

IV. The Decision Below

The court below (Chase and Frank, JJ., with Swan, J., dissenting) accepted all of the Board's findings of fact and conclusions of law and enforced in full the Board's order (R. 364-370). Rejecting petitioners' contention that by engaging in a strike before the expiration date of the contract the employees had violated the no-strike clause and hence were not entitled to the protection of the Act, the court below stated that (R. 366), "since the strike was caused and prolonged by the [petitioners'] unfair labor practices, we agree with

the Board that it is not prohibited by the strike-waiver clause in the contract." The court held that the "clause must be interpreted in the light of the entire contract of which it is an integral part" and when so viewed "the inhibition which it imposes is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties" (R. 366). Here, the court stated, "Unfair labor practices in violation of the Act were in no way covered by the contract, nor did the contract provide means for combating them or settling disputes arising because of them. And, of course, [petitioners'] unlawful activities cannot be considered part of the normal relations of the parties" (R. 367).

The court also found without merit petitioners' further contention that because the strike occurred less than 60 days after the Carpenters' formal notice to petitioners of an intent to modify the existing contract (*supra*, p. 6), the employees who struck failed to comply with the "waiting period" prescribed in Section 8(d)(4) of the Act, and thereby lost their employee status. The court said (R. 368-369):

> Section 8(d)(4) of the Act deals with the obligation to bargain collectively in good faith and particularly with the termination or modification of existing bargaining contracts. After making provision for procedures looking toward the attainment of such ends, which

> contain conditions applicable both to employers and employees, a sanction is imposed upon employees as a coercive measure to prevent their use of the strike either to obtain or to prevent the termination or modification of a collective bargaining contract. The "sixty-day period" is a special period during which the status quo ante is to be maintained in respect to employer-employee relationships while the statutory method for bargaining as to existing contracts set up in the subdivision is being used; and a "strike within the sixty-day period" means a strike in interference with the use of that method. In other words, it is tied to the method by the modifying words "within the sixty-day period" and that tie limits the sanction Congress imposed upon the employees involved in the use of the statutory method and excludes strikes which are still protected activities because they are unconnected with the use of the method.

Accordingly, the court concluded that since the strike here "was caused solely by the unfair labor practices" of the petitioners, "and was not motivated by any purpose so to obtain any economic advantage by way of contract modification," Section 8(d) was not applicable, and the employees were therefore entitled to the full protection which the Act normally accords to unfair labor practice strikers (R. 368).

SUMMARY OF ARGUMENT

I

The Board and the court below correctly construed the no-strike clause in the agreement between petitioners and the Carpenters as not constituting a waiver of the employees' right to strike in protest against serious unfair labor practices. The clause must be read in the context of the whole agreement. The agreement, specifying in conventional form the conditions of employment for its duration, contained certain provisions relevant to the commitment undertaken by the parties to refrain from strikes or lockouts. Thus, it specified the substantive terms governing the employment relationship; the parties thereby contracted to be bound by those terms for the duration of the agreement and the no-strike, no-lockout provision was an express guarantee that there would be no resort to self-help to effect changes of the agreed terms during the life of the agreement. Similarly, the parties agreed upon a grievance and arbitration procedure for the peaceful settlement and adjustment of contract disputes; and the no-strike, no-lockout commitment was an express guarantee that there would be no resort to self-help with respect to those matters which the parties agreed were to be processed through the contractual adjustment procedure. It is evident from a consideration of the contract as a whole that the union did not give up the right to strike, nor the employer the right to lock-out, at large; other provisions con-

tained in the contract in exchange for which self-help was surrendered measure the extent to which the parties intended to relinquish resort to strike or lockout.

The contention that the no-strike commitment constitutes a surrender of the right to strike against unfair labor practices can find no support in any other part of the agreement. Licensing an employer to engage in unfair labor practices is not the *quid pro quo* for an agreement on employment terms. The grievance and arbitration procedure established by the agreement for the adjustment of disputes does not suggest that the employees have agreed to forego striking against unfair labor practices. The procedure applies only to disputes arising out of "differences * * * as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." Petitioners' unfair labor practices which caused the strike were not a "difference" within the purview of this provision; they had nothing to do with the meaning or application of the agreement and they were, therefore, beyond the scope of the contractual method for adjustment of disputes. It cannot be fairly inferred that the union relinquished the right to strike over a subject for which the contract provided no substitute method of settlement. In sum, the no-strike clause cannot reasonably be construed to mean more than that with respect to disputes arising out

of the contract and the normal day-to-day relations of the parties the union would not resort to strike action for the adjustment of such disputes.

Another important reason requires this result. The right to protest against unfair labor practices is fundamental. Under the Act employees who strike as a result of unfair labor practices normally have an absolute right to reinstatement upon unconditional application for reinstatement despite intervening replacement. If the strike here was in breach of the no-strike clause, the employees would have been engaging in unprotected activity and subject to peremptory discharge or discipline. To interpret the clause to forbid strikes against unfair labor practices would mean that the employees have surrendered special statutory protection with no showing that they have gained from the employer a corresponding consideration. Relinquishment of the employees' statutory right to reinstatement, as with any waiver of other statutory rights, should be clear and unequivocal. It should not be inferred from the general provisions in a collective bargaining contract which do not make clear that strikes caused by the employer's unfair labor practices were included in the prohibition.

Even assuming that the strike was in breach of the no-strike clause, petitioners may not assert as a defense a strike which was caused by their wrongful conduct. Petitioners' serious unfair labor practices constituted such provocation as to substantially hinder compliance with the no-strike

pledge. An employer should not be permitted to assert that his employees have forfeited their normal right to statutory protection because of an alleged contract violation flowing from the very strike which his illegal conduct has caused.

II

Section 8(d), read as a whole, does not apply to strikes, unconnected with advancing any contract demand, to protest and remedy an employer's unfair labor practices. Section 8(d), as is evident from the whole of the section, is devoted entirely to the orderly functioning of the bargaining process. A strike or lockout is prohibited during the "waiting period" prescribed in the Section only when recourse to it is for the purpose of effecting changes in existing contract terms. The statutory scheme is based upon the hope that the prescribed "waiting period" of uninterrupted negotiation, with the assistance of governmental conciliators, will produce agreement without the need for resort to industrial strife. The Act therefore enjoins resort to economic warfare to compel either party to accede to the contract demands of the other before the expiration of the "waiting period." To give the prohibition against strikes or lockouts greater scope leads to consequences so incongruous that it cannot reasonably be inferred that Congress meant to require them. It would mean that a union, satisfied with its contract and not seeking modification of its terms, may strike against unfair labor practices, but that a union seeking modification,

and having given notice to that effect, loses that right during the 60-day waiting period. It would mean that a union without a contract, but in the process of negotiating one, may strike against unfair labor practices, while a union which has given notice of modification of termination of an existing contract and is negotiating a successor agreement may not strike against unfair labor practices for a minimum of 60 days. There is no discernible reason for making such incongruous distinctions or for assuming that Congress intended them. Unless the clear terms of the statute compel a construction so much at variance with the policy underlying it, it should not be so interpreted.

The legislative history confirms the view that Section 8(d) was not intended to apply to strikes called to protest unfair labor practices. The debates and committee reports suggest no broader scope for the Section than providing for an orderly method for negotiating successor agreements.

ARGUMENT

I

The Board and the Court Below Properly Found that the "No-Strike" Clause in the Agreement Between Petitioners and the Carpenters Did Not Constitute a Waiver of the Employees' Right to Strike in Protest Against Petitioners' Unfair Labor Practices

Section 13 of the National Labor Relations Act, as amended, provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or

diminish in any way the right to strike, or to affect the limitations or qualifications on that right." The Labor Management Relations Act of 1947 contains only four such specific limitations on the right to strike.[5] It is not uncommon, however, for parties to collective bargaining agreements to waive that right by contractual arrangements. Such arrangements are known as "no-strike clauses" by which the union pledges to abstain from striking during the life of the collective bargaining agreement.

In *Joseph Dyson & Sons, Inc.*, 72 NLRB 445, 447, and in *Scullin Steel Company*, 65 NLRB 1294, 1318, the Board held that a strike conducted in breach of such a no-strike clause was an unprotected activity, and that employees engaged in it were therefore vulnerable to discharge, in the absence of a "showing that the [employer] had breached the contract or that the strikes were caused by any unfair labor practices * * * ."[6] The

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[5] Sections 8(b)(4), 8(d), 206-210, 305. Of these, only Section 8(d), providing for a "waiting period," is involved in this case (see *infra*, pp. 44-61).

[6] The Board has held that the right to strike, although protected by the Act, may be waived because such waiver tends to realize the purposes of the Act by encouraging the practice and procedure of collective bargaining rather than resort to industrial warfare. *National Electric Products Corp.*, 80 NLRB 995; *Singer Mfg. Co.*, 24 NLRB 444, 467. See also, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 237.

During the deliberation on the Taft-Hartley amendments to the National Labor Relations Act, the House Conference Report and Senator Taft referred to *Dyson* and *Scullin Steel*, *supra*, with approval and observed that "the Board held that strikes in violation of collective bargaining contracts were

threshold question presented here is, therefore, whether, as petitioners assert, the strike called by the Carpenters was in breach of the no-strike provision of the then current agreement between petitioners and the Carpenters so as to disqualify the strikers from the protection of the Act even though the strike was caused by petitioners' unfair labor practices.[7] The Board and the court below correctly, we think, rejected this contention. As we explain in detail *infra*, (1) the no-strike provision construed in the light of the whole agreement cannot fairly be read as a promise to refrain from striking against the commission of serious unfair labor practices, and (2) in any event, petitioners may not assert as a defense the breach of an agreement induced and therefore excused by their own wrongful conduct.

1. The basic reasons why the no-strike provision was not a commitment to refrain from striking against unfair labor practices were set forth by the court below. As it explained (R. 366-367):

> . . . since the strike was caused and prolonged by the respondents' unfair labor practices, we

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not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 39, in 1 Leg. Hist. 543, and 93 Cong. Rec. 6442, in 2 Leg. Hist. 1539. "Leg. Hist." refers to the two-volume edition of the "Legislative History of the Labor Management Relations Act, 1947" (U. S. Govt. Print. Off., 1948).

[7] As noted above (pp. 7, 8), the strike began on November 10, 1950, twenty days prior to the expiration date of the agreement.

agree with the Board that it is not prohibited by the strike-waiver clause in the contract. That clause must be interpreted in the light of the entire contract of which it is an integral part, not as an isolated waiver unrelated to the rest of the agreement, and the inhibition it imposes is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties. Instances of strikes to enforce changes in contract provisions which violate a no-strike clause, of which *Scullin Steel Company*; 65 NLRB 1294, and *Joseph Dyson & Sons, Inc.*, 72 NLRB 445, are examples, should be distinguished. The right of employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition. See *National Electric Products Corporation*, 80 NLRB 995. Unfair labor practices in violation of the Act were in no way covered by the contract, nor did the contract provide means for combating them or settling disputes arising because of them. And, of course, the respondents' unlawful activities cannot be considered part of the normal relations of the parties.

The Seventh Circuit, the only other Court of Appeals which has considered this issue, has fully concurred in the foregoing views. *National Labor Relations Board* v. *Wagner Iron Works*, 220 F. 2d 126, 139-141, pending on petition for certiorari, No. 185, this Term.

We submit that this reasoning is sound. The collective bargaining agreement, specifying in conventional form the conditions of employment to prevail in the plant for its term, contained certain provisions relevant to the commitment by both parties to refrain from strikes or lockouts (R. 253-262). It is evident that the union did not give up the right to strike, nor the employer the right to lock out, at large; other promises contained in the agreement, in exchange for which self-help was given up, measure the extent to which the parties intended to relinquish recourse to strike or lockout.[8]

Looking to the whole agreement to determine the scope of the no-strike commitment, it would seem apparent that it does not prohibit a strike against unfair labor practices. Thus, the parties specified the substantive terms governing the employment relationship; they thereby contracted to be bound by those terms for the duration of the agreement; and the no-strike no-lockout provision is an

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[8] "Labor contracts must be construed in the light of the objects to be accomplished. Each party assumes certain obligations in consideration of the obligations assumed by the other contracting party." *Textile Workers Union* v. *Aleo Mfg. Co.*, 94 F. Supp. 626, 629 (M.D. N.C.).

cause " subject, however, to review under the contract procedures.

Even assuming that the discharge of Ciccone were a matter cognizable under the grievance and arbitration provisions of the contract, petitioners' argument in this respect must nevertheless fail in view of the findings of the Board, approved by the court below as amply supported by the record. Both the trial examiner and the Board found that the strike "was clearly caused and prolonged by the cumulative effects of [petitioners'] unfair labor practices culminating in the discriminatory discharge of Ciccone" and that the "discharge was merely the climactic aspect of [petitioners'] illegal course of conduct" or, as the court below phrased it, "the spark which set off the strike, not the essential cause of it" (R. 328, 342, 367). Given this finding,[22] it is immaterial whether or not the Ciccone discharge may have been open to adjustment under the contract procedures. In any event, it is unreasonable to suppose that the parties contemplated that a discriminatory discharge based upon union considerations was the type of discharge subject to adjustment under the contract procedure. What the parties envisaged was the case of a genuine but disputed discharge for cause which presented a legitimate issue whether the

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[22] "* * * in considering the question of sufficiency of evidence to support an administrative order this Court must and does rely largely on a first reviewing court's conclusion." *Radio Corp. v. United States*, 341 U. S. 412, 415; *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490-491.

express guarantee that there will be no resort to self-help to effect any change or modification of the agreed terms during their life. Correlatively, since differences necessarily arise in the administration of any agreement, the parties also agreed upon a grievance procedure and binding arbitration as a peaceful means of adjusting contract disputes; the no-strike no-lockout provision is an express guarantee that there will be no resort to self-help with respect to those matters that the parties have agreed are to be processed through the contractual adjustment procedure. "It is, of course, entirely obvious that when parties sign a collective agreement, they fully expect that disputes will arise as to its interpretation and application from day to day. That is precisely why the grievance procedure was established. It is the orderly, economic procedure prescribed for *those situations in which a violation of agreement is alleged.*" (Emphasis supplied).[9]

The no-strike no-lockout provision thus has application in relationship to the agreement's specification of substantive employment terms and to the procedural method for resolving differences arising from them. But to conclude that a no-strike commitment also means that employees have given up the right to strike against serious unfair labor practices can find no support in any other part of the agreement. Thus, it could hardly be said that

[9] Opinion of Umpire Shulman in *Ford Motor Co.* quoted at pp. 47-49, Shulman and Chamberlain, *Cases on Labor Relations* (1949).

the settlement of substantive terms of employment implied the employees' agreement to tolerate serious unfair labor practices without striking. Licensing an employer to engage in unfair labor practices without the risk of a strike is not the *quid pro quo* for an agreement on employment terms. Nor does the provision for a grievance procedure and for arbitration suggest that the employees have agreed to forego striking against unfair labor practices. The sole disputes arbitrable under the contract, and therefor the only ones for which there was a contractual adjustment procedure, were "differences * * * as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." Petitioners' commission of unfair labor practices, which in their cumulative effect caused the strike (*supra*, pp. 8-10), was not a "difference" within the purview of this provision; it had nothing to do with the meaning, interpretation, operation, application or breach of the agreement as these words are customarily used in a contract context; it was therefore outside the contractual method for the solution of disputes. It is not fairly inferrable that the union relinquished the right to strike over a subject for which the contract provided no substitute method of settlement.[10]

As the Court of Appeals for the Seventh Cir-

[10] 21 Geo. Wash. L. Rev., *The No-Strike Clause*, 127, 153, 157-163.

cause asserted existed or was adequate to support the discharge.[23] This inference is buttressed by the fact that the normal and legally exclusive forum for unfair labor practice adjudication is the Board and not arbitration.[24]

Petitioners do not explain how their illegal efforts to insure the Paper Workers' succession to the Carpenters as bargaining representative of the employees after the expiration of the contract gave rise to issues relating to the meaning and application of the recognition and union security provisions of the agreement. Although petitioners were attempting to undermine the Carpenters' majority status and thereby preclude its continuance as bargaining representative after the expiration of the contract, no controversy had arisen that petitioners were failing to accord the Carpenters the recognition to which it was entitled during the life of the contract or that the employees were de-

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[23] Discharge cases giving rise to the meaning and application of agreements "may involve a variety of questions: the manner in which employees are informed of the conduct expected of them, the procedure used in the imposition of discipline, the sufficiency of the cause for penalty, the adequacy of the evidence to establish guilt or innocence or justification, the reasonableness or propriety of the particular penalty imposed, and so on." Shulman and Chamberlain, *Cases on Labor Relations*, p. 366 (1949).

[24] *National Labor Relations Board* v. *UAW, Local 291*, 194 F. 2d 698 (C.A. 7); *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 48 (C.A. 9), certiorari denied, 324 U.S. 877; *National Labor Relations Board* v. *Bell Aircraft Corporation*, 206 F. 2d 235, 237 (C.A. 2); cf. *National Labor Relations Board* v. *General Motors Corporation*, 116 F. 2d 306, 312 (C.A. 7).

cuit, interpreting a no-strike clause similar to the one here, stated (*Wagner Iron Works, supra*, 220 F. 2d at p. 140):

> The "no-strike" clause must be interpreted in the light of other terms of the contract. The agreement covers rates of pay and working conditions, and its remedial provisions do not purport to extend beyond that. Thus, as we have observed, the grievance procedure is expressly designed to settle disputes over the "meaning, application or interpretation of this agreement"; the arbitration provision is expressly limited "to the interpretation and application of the express terms of this agreement"; the policy statement of the parties, which forms a basis for the "no-strike" and "no-lock-out" clauses, is an agreement that such procedures are adequate "to provide a fair determination of all grievances which may properly arise under the terms of this agreement." The no-strike clause which follows immediately after this statement must be construed, as equally restricted, *i.e.*, as a surrender of the right to require a change in the contract or as a means of settling any dispute which is embraced by its terms. Since the contract does not purport to reach all conceivable phases of employer-employee relations, this clause can not well be interpreted as a surrender of the right to self-help, as a measure to protest against unfair labor practices.

Accordingly, the court below properly concluded that the strike was not within the prohibition of the no-strike commitment, for that promise "is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties" (R. 366).[11] This interpretation of the no-strike clause of the collective bargaining agreement is in keeping with the normal

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[11] The decision, *Matter of Western Union Telegraph Co.*, 299 N. Y. 177, 86 N. E. 2d 162, relied on by petitioners (Br. 43) does not reach the problem posed here. There, the New York Court of Appeals merely held that an arbitrator, in construing a no-strike clause in a contract in the light of practices prevalent in the particular industry, had exceeded his authority under the contract which provided that the arbitrator was without authority to alter or modify any of the express provisions of the contract.

In this connection it may also be noted that, in their brief to the court below (p. 15), petitioners stated that, under the law of New York where the contract was executed, "no arbitration clause, whether its form be 'broad' or restricted, can be written which will give an arbitrator jurisdiction to prevent unfair labor practices," citing *Benedict* v. *Limited Editions Club, Inc.*, 39 N. Y. Supp. 2d 852, 853 (Supreme Court, Appellate Division), where the court stated:

> The question submitted to the arbitrator was not an arbitrable one under the provisions of Section 1448 of the Civil Practice Act. Accordingly, the Special Term had no power on motion to confirm such an award, or to direct entry of judgment thereon. Only matters which can be made the subject of an action may be submitted to arbitration under that section. * * *
>
> By statute, the exclusive method for reinstatement available to the two employees engaged in interstate commerce, allegedly discharged for labor activities, would be upon a proceeding had before the National Labor Relations Board. * * *

See also p. 43 n. 24, *infra*.

understanding of the function of no-strike no-lockout clauses. The late Dean Harry Shulman, acting as permanent arbitrator under the Ford-UAW (CIO) collective bargaining agreement, explained with respect to that agreement, but in terms which have pertinence here, that (*Ford Motor Co.*, 6 Lab. Arb. Rep. 799, 801-802 (1947)):[12]

> The no-strike portions [of the agreement] merely state in express words what would be implied in the rest of the contract if they were omitted.
>
> Thus, Section 1 of Article V prohibits strikes on matters which may be finally determined by the umpire or to avoid the effects of a decision by him. Now the whole purpose of a grievance procedure with a terminable step of arbitration is to substitute that method of adjustment for strikes, lockouts, and similar measures of self-help. The very provision of a grievance procedure and of an umpire whose decisions are final means that there must be no strikes on matters within his jurisdiction or for the objective of avoiding

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[12] See also, *General Teleradio, Inc.*, 18 Lab. Arb. Rep. 418, 427-428; *Brynmore Press, Inc.*, 7 Lab. Arb. Rep. 648, 653-654; *Simplicity Pattern Co.*, 7 Lab. Arb. Rep. 180, 182-183; *Aluminum Co. of America*, 7 Lab. Arb. Rep. 442, 447; *C. G. Hussey & Co.*, 7 Lab. Arb. Rep. 590, 594; *Armour & Co.*, 8 Lab. Arb. Rep. 758, 770; *Rheem Mfg. Co.*, 8 Lab. Arb. Rep. 85, 87. And see the excerpts from the arbitration decisions in *Philadelphia-Marine Trade Assn.* v. *ILA*, 34 LRRM 2087 (Pa. Ct. of Com. Pleas, April 21, 1954).

the effects of his decisions. Section 1 merely makes that meaning express.

Again, that section prohibits strikes to change or add to the contract or on matters which the contract specifically commits to the company's discretion. Now surely this is no more than would be true without express statement. The whole purpose of the collective agreement is to state the terms of employment for its duration. The parties agree to accept those terms until a fixed date. To strike for an alteration prior to that date would be to destroy the fundamental purpose and idea of the contract. Accordingly, such a strike would be a violation of the contract even without the express statement.

The Bureau of Labor Statistics states in like tenor that (Bull. No. 908-13, U. S. Dept. of Lab., Bur. Lab. Stat., p. 1 (1949)):[13]

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[13] See also, 3 President's Natl. Lab.-Man. Conf. 140 (1945) ("* * * grievances and disputes involving the interpretation and application of the agreement will * * * inevitably arise, for the adjustment of which adequate provision should be made. This requires procedural clauses for the settlement of such grievances and disputes, and a firm commitment by Managements and Unions that these procedures will be followed as a substitute for strikes and lockouts"); Peterson, *Settlement of Grievances Under Union Agreements*, 50 Monthly Lab. Rev. 286, 287 (1940) ("Throughout all steps in the adjustment process it is understood that strikes and lockouts are to be used only after all other methods provided for the adjustment of the dispute have failed."); McCabe, *Machinery for the Adjustment of Disputes Under New Collective Agreements*, 5 Law & Contemp. Prob. 261, 271 (1938) ("It is almost a universal corollary of the inclusion of an ad-

simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred; provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

Section 8(d) then provides that:

* * * the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.[25]

Section 8(d) concludes with a provision stating the disability visited upon an employee who engages

[25] This sentence is preceded by the presently immaterial statement that: "The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) * * *."

> The existence of a collective bargaining agreement implies that no work stoppage will take place while peaceful adjustment procedures are available, and almost every agreement outlined in considerable detail the machinery and the steps to be followed for the settlement of disputes and other grievances. Many contracts contain explicit prohibition of restrictions on work stoppages—whether these be strikes or lockouts. Such "no-strike, no-lockout" clauses are designed as extra assurance that the contract procedure will be used and used fully before resorting to a strike or lockout.

It is thus clear that a pledge not to strike is not a promise dissociated from the remainder of the agreement but has its reason for being in the substantive terms settled by the agreement and in the contractual adjustment process that the agreement creates as a substitute for self-help with respect to contract differences. The interrelation is further shown by holdings that if the employer refuses "to arbitrate, the union will have the right to treat the contract as breached and to consider itself relieved from the obligation to refrain from striking." *Local 1111, U.E.R. & M.W.* v. *Allen-Bradley Co.*, 255 Wis. 613, 617, 39 N.W. 2d 740, 742; *Boeing Air-*

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justment procedure in a collective agreement that there shall be no strike or lockout until the procedure has been exhausted."); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 308-309 (1948).

"in a strike within the sixty-day period specified in this subsection":

> Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Petitioners' principal argument (Br. 19-22) that the unfair labor practice strike in this case violates Section 8(d) runs as follows: the words "any employee" and "a strike" in the last quoted clause are without limitation and therefore mean any strike, without regard to its character, and that it is of no significance that the provisions preceding this clause relate to the requirements which must be satisfied in order to effect changes in existing contract terms. In this manner petitioners would render irrelevant the fact that the strike here was induced by their own unfair labor practices.

Petitioners' insistence upon isolating the concluding sentence of Section 8(d) fails, as the court below pointed out (R. 368-369), to give "due consideration" to the language of Section 8(d) "as a whole" and to the Congressional purpose reflected in the Section in its entirety and confirmed by its legislative history. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the

plane Co. v. Aeronautical Industrial Lodge, 91 F. Supp. 596, 608 (W.D. Wash.), affirmed, 188 F. 2d 356 (C.A. 9), certiorari denied, 342 U.S. 821; *General Teleradio, Inc.*, 18 Lab. Arb. Rep. 418, 427-428.[14] In sum, where the dispute concerns a matter not within the contractual adjustment procedure and the normal day-to-day relations of the parties, where there is no attempt to alter an agreed substantive term of employment, and where the integrity of the contract as an instrument governing the normal relations between the parties is otherwise unaffected, there is no obligation to refrain from striking. In the absence of a showing to the contrary, and none exists in this case, a no-strike commitment, we submit, is not to be interpreted to extend outside the field of the contract and the normal day-to-day relations of the parties,[15] and to preclude a strike caused by and in protest of unfair

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[14] Annotation, 2 A.L.R. 2d 1278, 1285: "Whatever restrictions upon the right to strike or to picket may flow from the existence of a collective labor agreement between the parties, such restrictions do not apply where the employer himself has first breached the agreement * * * and this rule applies even though the agreement contains an anti-strike pledge."

[15] After the Board's decision and order herein was issued, petitioners attempted to introduce further evidence concerning certain proposals made by the Carpenters during negotiation of the 1949 contract (R. 360). One of these proposals was that "all disputes, whether or not arising from contract be referred to arbitration" (R. 361). Petitiongrs' rejection of this proposal lends additional support to the view that it was not within the contemplation of the parties to extend the no-strike clause to matters outside the field of the contract and the normal day-to-day relations of the parties.

labor practices committed by an employer, as in this case.

Another important reason requires this result. The right to strike may no doubt be waived, but as with every waiver of a statutory right, it must be "clear and unmistakable." *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, 958 (C.A. 5). Accord: *National Labor Relations Board* v. *Wagner Iron Works*, 220 F. 2d 126, 141 (C.A. 7). See also, *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F. 2d 149, 153 (C.A. 9); *National Labor Relations Board* v. *Otis Elevator Co.*, 208 F. 2d 176, 179 (C.A. 2).

As both the court below (R. 366-367) and the Seventh Circuit (220 F. 2d at p. 141) have stated, the right to strike to protest against the commission of unfair labor practices is fundamental. Congress preserved the right to strike to oppose unfair labor practices despite the availability of an administrative remedy before the Board as an alternative to self-help (*infra*, pp. 58-59); more than that, unlike employees striking in support of an economic demand who run the risk of permanent replacement while on strike, unfair labor practice strikers normally have an absolute right to reinstatement upon their unconditional application despite intervening replacement.[16] To infer a waiver of these

[16] *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. 2d 432, 437 (C.A. 7); *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 16-17 (C.A. 1); *National Labor Relations Board* v. *Crosby Chemicals, Inc.*, 188 F. 2d 91, 95

rights is to hold that the employees have surrendered special statutory protection with no showing that they have gained from their employer a corresponding consideration. And the consequences of such surrender are drastic; deprived of a status of virtually absolute protection, the employees are now in the opposite position of engaging in unprotected activity and therefore being open to peremptory discharge or discipline at the employer's wish. Relinquishment of this statutory right with these serious consequences should rest only upon the clearest expression of intent. No such expression appears here. As both the court below (R. 366-367) and the Seventh Circuit have pointed out (*Wagner Iron Works, supra*, 220 F. 2d at 141):

> The right of employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition.

2. Apart from the foregoing, even assuming that the no-strike commitment is as broad in scope as petitioners assert, it is not denied that any breach in this case was provoked by the serious unfair

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(C.A. 5); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928; *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9).

labor practices on petitioners' part. Hence, as the Board held (R. 343, 345, n. 9), petitioners "should not be allowed to assert, as a defense, a strike which was caused by their own wilful, deliberate, widespread, and grave unfair labor practices."

It is a principle of general contract law that "One who is himself the cause of another's nonperformance cannot charge the other with breach of duty * * *." Corbin on *Contracts*, § 770 (p. 964). For, "When a contract is made, legal duties may be created that the parties themselves did not intend. * * * Neither one may expressly promise that he will forbear to put hindrances in the way of performance by the other * * *. Nevertheless, a contract creates duties of this sort; and a breach of contract may be committed by prevention, hindrance or repudiation." *Id.*, § 944. And so, "To one who is sued for nonperformance of his promise it is a defense if he can prove that his performance was prevented or substantially hindered by the plaintiff." Id., § 947 (p. 814); see also §§ 1264, 571 (p. 211).[17] As explained in *Patterson* v. *Meyerhofer*, 204 N.Y. 96, 100-101, 97 N.E. 472, 473:[18]

> [It is] the general rule that a party who causes or sanctions the breach of an agreement is

[17] And see, Williston, *Contracts*, §§ 677, 887A (Rev. Ed. 1936); *Restatement, Contracts*, §§ 295, 315, 317.

[18] See also *Stevens* v. *Howard D. Johnson Co.*, 181 F. 2d 390, 393 (C.A. 4); *Tradewell Foods, Inc.* v. *New York Credit Men's Adjustment Bureau*, 179 F. 2d 567, 568 (C.A. 2); *Atlas Trading Corp.* v. *S. H. Grossman, Inc.*, 169 F. 2d 240, 244 (C.A. 3); *Vanadium Corp. of America* v. *Fidelity & Deposit Co.*, 159 F. 2d 105, 108 (C.A. 2).

thereby precluded from recovering damages for its non-performance or from interposing it as a defense to an action upon the contract. (*Young* v. *Hunter*, 6 N.Y. 203; *Barton* v. *Gray*, 57 Mich. 622 [24 N.W. 638], and cases there cited).

"Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which may hinder or obstruct that other in doing that thing." *Gay* v. *Blanchard*, 32 La. Ann. 497.

Where the promisee has itself obstructed performance "it is unimaginable that any civilized system of law would allow it to recover * * * for a failure to perform." *Porto Rico* v. *Title Guaranty and Surety Co.*, 227 U.S. 382, 389; see also *United States* v. *Peck*, 102 U.S. 64, 65-66. "And that rule applies to labor contracts." *United Electrical, etc. Workers* v. *National Labor Relations Board*, 223 F. 2d 338, 341 (C.A. D.C.), pending on petition for certiorari, No. 343, this Term.

It is clear that the strike in this case was caused by petitioners' own wrongful conduct in engaging in serious unfair labor practices. Those grave wrongs substantially hindered compliance with any no-strike pledge, because forbearance to strike in the face of such unlawful provocation cannot reasonably be expected of employees or their bargaining representative. By engaging in an illegal course of conduct calculated to destroy the bargaining representative of the employees, peti-

tioners created a state of affairs virtually equivalent to prevention of any pledge not to strike. This being so, they cannot assert as a defense nonperformance for which they were responsible. "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect "this is your own act, and therefore you are not damnified.' [Citations.] Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. * * * A suit may not be built on an omission induced by him who sues." *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 61-62.[19] And so, as the Board concluded (R. 325-326, 345, n. 9):

> Surely, an employer, who like [petitioners] here, by his own wilful, deliberate, widespread, and grave unfair labor practices, has caused his employees to protest in a traditional way his disposition to violate the law, should not be allowed to assert that his employees forfeited their normal rights to statutory protec-

[19] See also *Stockstrom* v. *Commissioner of Internal Revenue*, 190 F. 2d 283, 288-289 (C.A. D.C.).

tion, because of an alleged contract violation flowing from the very strike for which he was responsible. To hold that such employer misconduct does not excuse employee performance of a "no-strike" clause would be offensive both to the spirit of the Act and to one's sense of right. More than that, it would—in the words of Chairman Herzog in his concurring opinion in the *National Electric Products* case [80 NLRB 995, 1002]—be "likely to encourage the commission of [employer] unfair labor practices of such provocative magnitude that, human nature and the Board's delays being what they are, employees can reasonably be expected—or intended—by their employer to turn to what may prove to be suicidal self-help."

* * * * *

To require employees in a situation such as appears in the instant case, where time is of the essence, to forego self-help in favor of the time consuming remedial processes of the Board, or, if they would engage in self-help, to risk discharge, is to invite them to court disaster whichever way they turn.[20]

3. Petitioners urge that Section 13 of the Act precludes the construction of the no-strike clause adopted by the Board and approved by the court below. The argument is (Br. 40) that the no-strike clause in the contract is a "limitation

[20] See 53 Col. L. Rev. 1023, 1025.

signed to eliminate " 'quickie strikes' " as part of the bargaining process during successor contract negotiation; it merely made it mandatory for "all [unions to] follow the sound, fair, and sane procedure which a majority of the good ones now follow." 93 Cong. Rec. 3014, in 2 Leg. Hist. 1496. That "sound, fair, and sane procedure" has been described as follows (Bull. 908-19, Dept. of Lab., Bur. Lab. Stat., p. 35 (1950)):

> Most contracts specify a fixed period of notice, usually 60 days, prior to the expiration date, in the event either party desires to modify or terminate the agreement on expiration. In both open-end and term contracts, provision is generally made for advance notice by either party of intention to modify or cancel the agreement. In the absence of a specified requirement for notice, it can be assumed that conferences on the contract would be initiated on the request of either party. Some agreements distinguish between requests for termination and for modification or amendment, and usually require a longer period of notice for termination. *The notice requirement is designed in order to give each party adequate time to study the issues, consider the other party's position, and to prepare its case.* [Emphasis supplied.]

Certainly it is no part of this "sound, fair, and sane procedure," which a "majority of the good [unions] now follow," to give the employer 60 days

or qualification" of the right to strike, and that under Section 13 it is not permissible to construe the Act "to diminish a limitation or qualification of the right to strike agreed upon by the parties." But Section 13 refers to "limitations or qualifications" on the right to strike in the Act itself. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 673; *United Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 258-259; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 59, in 1 Leg. Hist. 563.[21] And, as the Board stated (R. 345), "Section 13 * * * enjoins *construction of the statute* which 'affect' limitations on the right to strike. It is sufficient to note * * * that it is not the Act or any part thereof which has been construed herein to limit the no-strike clause, * * * but the terms and scope of the clause itself." The court below, agreeing with the Board, stated (R. 369-370) that the argument necessarily "presupposes a limitation and has no significance as to whether there is one," which is the very question here in issue.

Furthermore, Section 13 also prohibits implying

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[21] Explaining the Section, the Conference Report stated:

> Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right.

an abridgment of the right to strike with the result that the effect of Section 13 is entirely neutral in a situation such as the present. If Section 13 has any effect, it is to support the Board's view. It is one of the provisions by which Congress "expressly recognized the 'right to strike'" (*C. A. W. v. O'Brien*, 339 U. S. 454, 457), and as a rule of construction, "By § 13, Congress has made it clear that * * * all * * * parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act." *National Labor Relations Board v. International Rice Milling Co.*, 341 U. S. 665, 673.

Petitioners also assert (Br. 40-42) that each of the unfair labor practices found by the Board to have preceded the strike did in fact relate to matters involving the "meaning, interpretation, operation, or application" of various clauses in the contract and were therefore subject to the contractual adjustment procedures. Thus, petitioners assert that (a) the findings with respect to petitioners' illegal assistance to the Paper Workers to insure its succession to Carpenters as the employees' bargaining representative was a matter covered by the recognition clause in the contract; (b) the finding that petitioners induced employees to join the Paper Workers is covered by the union-security clauses; and (c) Ciccone's discharge was a matter cognizable under the clause providing that the employer might discharge any employee "for proper

in which to commit serious unfair labor practices without risking an immediate strike in opposition to them. Such a moratorium is irrelevant to the objective of the prescribed notice which is "to give each party adequate time to study the issues, consider the other party's position, and to prepare its case."

To support the view that Section 8(d) prohibits an unfair labor practice strike during the 60-day period of notice, reliance is placed (R. 355) on statements of the minority, not specifically controverted, to the effect that under Section 8(d) "provocative conduct" by the employer during this period must be countenanced without "resort to self-help" and is to be dealt with through a Board order to " 'cease and desist' from such practices." S. Min. Rep. No. 105, 80th Cong., 1st Sess., 21-22, in 1 Leg. Hist. 483-484; 93 Cong. Rec. 6385, in 1 Leg. Hist. 887; 93 Cong. Rec. 4036, 6503, in 2 Leg. Hist. 1049, 1580. The short answer is that the views of opponents to legislation, who not infrequently may voice an extreme interpretation in order to defeat it, are not the most reliable index to the congressional intent. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of statutory words is in doubt."); *S. H. Camp* v. *National Labor Relations Board*, 160 F. 2d 519, 521 (C.A. 6), and cases cited.

From the enactment of the Act in 1935, it has been

faulting in carrying out the union security obligations prescribed by the agreement. Indeed, the Board rejected the claim that petitioners had refused to bargain with the Carpenters on any bargainable matter during the contract or that petitioners had committed an anticipatory breach of the contract by aiming to supersede the bargaining agent during, rather than at the end of, the contract term (R. 323, 340). In these circumstances, there was no occasion to resort to the adjustment procedures of the contract.

II

Section 8(d) of the Act Does Not Apply to Employees Who Engage in a Strike, the Purpose of Which Is Not to Terminate or Modify an Existing Collective Bargaining Contract But to Protest Against the Employer's Unfair Labor Practices

The contract between the Carpenters and petitioners was to expire on November 30, 1950 (*supra*, p. 3). The union's notice "requesting modification of our contract with you" and a meeting "for the purpose of negotiating such modification" was served on petitioners on October 10, 1950 (R. 23, 263). The strike began on November 10, 1950, less than 60 days after the notice of modification (*supra*, p. 6). Petitioners contend that under Section 8(d) of the Act no strike may take place before the expiration of the "waiting period" prescribed in that section; that employees engaging in such a strike lose their protected status as employees; and that petitioners were therefore free to discharge

the strikers. The court below rejected this contention, finding that the strike was neither called nor continued to effect a modification of the contract and holding that Section 8(a) has application only to strikes pertaining to contract negotiation and not to strikes protesting, as here, the commission of unfair labor practices (R. 367-369).

The Board found that the strike was caused and prolonged solely by petitioners' unfair labor practices and was designed to protest and remedy their commission. More specifically, the Board, adopting the trial examiner's findings, concluded as follows (R. 329):

> * * * the purpose of the strike was to protest and seek to remedy [petitioners'] unfair labor practices. The record does not support a finding that the strike also had as an additional objective the termination or modification of the existing contract. It is true that demands for contract changes had previously been presented to [petitioners] and there had been some discussion at meetings of [the Carpenters] of a possible strike if such demands were not met. But no strike vote on that issue had ever been taken, nor was any strike action otherwise determined upon. On the record as a whole, I am fully satisfied, and I find, that the strike which immediately followed Ciccone's discharge was unplanned and began as a spontaneous demonstration by employees of their protest of [petitioners'] unfair labor practices.

> Nor does the record reflect that its character changed after it began to one where the strikers were seeking to compel changes or modifications in economic terms or conditions of employment. There is no evidence that any negotiations were conducted, or overtures made, along such lines at any time after the commencement of the strike. [Petitioners] at the hearing made no such claim, and offered no evidence to establish that the strike had any purpose other than, or in addition, to that claimed by the General Counsel.

The court below approved these findings as "based upon ample evidence" (R. 368) and petitioners do not challenge them.

The question presented, therefore, is whether Section 8(d) of the Act prohibits a strike, unconnected with advancing any contract demand, to protest and remedy unfair labor practices, except upon expiration of the "waiting period" prescribed in that Section. Section 8(d) contains the Act's definition of the duty to bargain collectively. It begins with the statement that:

> For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and

the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

It continues with a proviso specifying the method to be followed in effecting the termination or modification of an existing collective bargaining agreement:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and

whole law, and to its object and policy." *United States* v. *Boisdore's Heirs*, 8 How. 113, 122; *Peck* v. *Jenness*, 7 How. 612, 622-623. As the court below stated (R. 368), to ascertain the true meaning of Section 8(d), "as usually must be done in interpreting a statute, all of its provisions should be read in the light of the legislative purpose and with reference to each other." Looking to the whole of Section 8(d), it is clear that the concluding clause stating that a striker "shall lose his status as an employee" specifies the sanction. The prohibition for the violation of which the sanction applies is to be found in the preceding subsections. And reading the prohibition and the sanction together shows that Section 8(d) does not forbid an unfair labor practice strike.

Thus, it is evident that Section 8(d) is devoted entirely to the orderly functioning of the bargaining process. Dealing first with the general elements of the duty to bargain, it next specifies the particular requirements in the special situation of a "party desiring * * * termination or modification" of an existing agreement. Sixty days' notice of the "proposed termination or modification" must be given; an offer to meet and confer "for the purpose of negotiating a new contract or a contract containing the proposed modifications" must be made; and if no agreement is reached within thirty days, notice of the existence of the dispute must be given the federal and state conciliators and mediators. And in order that these procedures may have a fair chance to succeed, all the "terms and condi-

tions of the existing contract" must for the sixty-day period of the notice, or until the expiration of the contract if that is later, remain "in full force and effect, without resorting to strike or lock-out."

It is plain that a strike or lockout is prohibited during the "waiting period" prescribed in Section 8(d), only when recourse to it is for the purpose of effecting changes in existing contract terms. The statutory scheme is based on the hope that a 60-day "waiting period" of uninterrupted negotiation, with the help where necessary of federal or state conciliators, will produce agreement without the need for recourse to industrial strife. And so the statute enjoins resort to a strike by a union or a lockout by an employer to compel either party to accede to the contract demands of the other before the expiration of that "waiting period." In short, Section 8(d) provides, as the Seventh Circuit, in full accord with the court below, has stated, "an orderly method for the modification or termination of existing agreements by proscribing, during the sixty-day cooling off period, strikes which interfere with the operation of the statutory method, *i.e.*, strikes to compel termination of the agreement or modification of its terms. That section has no application to a strike caused by an employer's unfair labor practices, in no way concerned with questions of termination or modification of the existing agreement." *Wagner Iron Works, supra*, 220 F. 2d at p. 141.

To give the prohibition against strikes or lockouts in Section 8(d) greater scope than this leads to

consequences so incongruous that it cannot reasonably be inferred that Congress meant to require them. It would mean that, once a union gives notice of modification or termination of an existing agreement, an employer acquires a minimum 60-day period during which he may engage in serious unfair labor practices without risking a strike in protest. No such license can possibly be justified in terms of the aim of Section 8(d) to provide for orderly renegotiation of agreements. It would mean that a union satisfied with its contract, and therefore having no desire for its modification or termination, may strike against unfair labor practices, but a union dissatisfied with its contract, and having therefore given notice of modification or termination, loses this right for a minimum of 60 days. There is no rational justification for presuming that a union's exercise of the right to negotiate a successor agreement entails the loss of the right to protest unfair labor practices by strike action. It would mean that a union without a contract—but which is in the process of negotiating its first one—may strike against unfair labor practices, but that a union which has given notice of contract termination or modification—and is negotiating its second contract—may not for a minimum of 60 days strike against the identical unfair labor practices. Again, there is no discernible reason why the contracting union should be under a disability from which the union without a contract is free where both are in the process of negotiating an agreement. As the

court below pointed out (R. 369), petitioners' reading of the Act would attribute to Congress:

> * * * the intent not merely to provide for an orderly way to terminate or modify existing collective bargaining agreements but the intent both to give an employer, by taking advantage of the method, an opportunity to indulge in unfair labor practices which employees would, perhaps, find it too hazardous to resist quickly and effectively by means of a strike, and to require employees, who used the method, to do so on pain of giving the employer just such an opportunity. It would discriminate, in respect to the right to resist unfair labor practices by striking, between employees working under a collective bargaining contract and those who were not and between unions who were satisfied with such existing contracts and those who were not. And it would penalize the latter for attempting lawfully to remedy their conditions by peaceful bargaining. In view of the well known purpose of the Act to prevent industrial strife, such an intent should not be attributed to Congress until, and unless, if sees fit to say so in clear and uncertain terms.[28]

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[28] Cf. 53 Col. L. Rev. 1023, 1025:

> [The Board's decision] manifest[s] a realistic approach to the legal problems peculiar to labor-management relations. Since invocation of the Act's protective machinery is time consuming, if Section 8(d) were applied to unfair labor practice strikes, the employer, im-

The legislative history confirms the view that Section 8(d) was not intended to apply to strikes called to protest and remedy unfair labor practices. The committee reports set forth below suggest no broader scope for the Section than providing an orderly method for negotiating successor agreements. S. Rep. No. 105, 80th Cong., 1st Sess., 24, 1 Leg. Hist. 430;[27] H. Conf. Rep. No. 510, 80th Cong.,

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mune during the critical 60-day period from the employees' only effective remedy, could engage in unfair practices designed to coerce employee concessions in the contract renegotiations—thus perverting the purpose of the section. The delay involved in using Board procedures also weakens the argument that unfair labor practice strikes violating no-strike clauses should be deemed unprotected in order to encourage recourse to the orderly processes of the Board. Moreover, the Board's approach to the no-strike clause accords with the view that collective bargaining agreements should be construed as charters governing a continuous complex relationship rather than as commercial agreements subject to technical contract rules. Even on the basis of contract law, however, the result finds support in the doctrine of constructive conditions of cooperation—that there is an implied understanding that neither party to a contract will affirmatively hinder performance by the other and if such hindrance occurs non-performance by the innocent party is excused.

[27] "Another substantive feature of this subsection is a provision which relates to employers and labor organizations which are parties to collective agreements. Most agreements have an expiration date, with an automatic renewal clause in the absence of advance notice by either side of a desire to terminate or modify. Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the terminal date, if they desire to terminate or amend. Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing the old contract has the duty to notify the new Federal Mediation Service of the impasse. Should the

1st Sess., 34-35, in 1 Leg. Hist. 538-539.[28] Senator Taft described Section 8(d) as a "revision of the collective-bargaining procedure, in connection with the mediation process," designed to "afford time for free collective bargaining, and then for the intervention of the Mediation Service." 93 Cong. Rec. 3839, in 2 Leg. Hist. 1015. Senator Ball, a manager of the amendments in the Senate and one of the conferees, stated that Section 8(d) was de-

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notice not be given on time, irrespective of the presence or absence of a 60-day clause in the collective agreement, it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period. Any employee who engages in a strike during the 60-day period would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed."

[28] "The Senate amendment also required, as part of the bargaining procedure, that no party to any collective bargaining contract should terminate or modify the contract unless the party desiring such termination or modification (A) served a written 60-day notice of the proposed termination or modification on the other party, (B) offered to meet and confer with the other party with respect thereto, (C) notified the Federal Mediation and Conciliation Service (a new independent agency later discussed) within 30 days after such notice of the existence of the dispute, if agreement had not been reached by that time, and (D) continued in full force and effect, without strike or lock-out, all the terms and conditions of the existing contract for a period of 60 days after the notice of desired termination or modification was given or until the expiration date of the contract, whichever occurred later.

"An employee who engaged in a strike within the 60-day period just described lost his status as an employee of the particular employer for the purposes of sections 8, 9, and 10 of the act."

clear that employees are not confined to the processes of the Board to redress unfair labor practices, but may resort to concerted activity for that purpose, and such recourse is itself protected.[29] And, in 1947, Congress repeatedly rejected proposals to cut down the right to strike against unfair labor practices. Thus, Senator Ball introduced a bill which, *inter alia*, would have amended Section 2(3) of the Act to provide that "The term 'employee' * * * shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute (unless, while engaging in a strike, such individual has been replaced or has refused an offer of reinstatement * * *)."[30] During discussion of the bill on the floor of the Senate, Senator Morse pointed out that the effect of the amendment would be to eliminate the established distinction between employees engaged in economic strikes and those striking against employer unfair labor practices. Senator Ball replied, "I am inclined to agree that * * * the bill does go too far and has an effect which I did not foresee when we drafted it."[31] Similarly, amendments containing provisions which prohibited "any

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[29] "* * * to hold that a worker who because of an unfair labor practice has * * * gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby." Senate Report No. 573 on S. 1958, 74th Cong., 1st Sess. (1935), pp. 6-7. See also, cases cited *supra*, p. 34, n. 16.

[30] S. 360, 80th Cong., 1st Sess., Sec. 2(b), p. 3 (January 27, 1947).

[31] 93 Cong. Rec. 1827-1828, in 2 Leg. Hist. 955-957.

strike or other concerted interference * * * to remedy practices for which an administrative remedy is available," and depriving employees engaging in such activities of "rights under this Act," were specifically considered and rejected.[32] And, although Section 9(c)(3) provides that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote" in Board conducted elections, this limitation is not applicable to unfair labor practice strikers. See *Union Mfg. Co.* v. *National Labor Relations Board*, 221 F. 2d 532 (C.A. D.C.), certiorari denied, 349 U.S. 921. It would seem evident, therefore, that Congress rejected any restriction upon the traditional right of employees to engage in a concerted activity for the purpose of protesting and opposing an unfair labor practice.

Petitioners further assert, however (Br. 23-33), that the concluding sentence of Section 8(d) denies to strikers employee status "for the purposes of

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[32] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C)(ii) and (d), in 1 Leg. Hist. 205-207; S. 360, 80th Cong., 1st Sess., Sec. 13 (b) (2) (January 27, 1947). Explaining the purpose of one of these proposed but rejected amendments, the House Report stated (H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 44, in 1 Leg. Hist. 335):

> Strikes and other concerted activities in lieu of using peaceful procedures for settling disputes that the National Labor Relations Act provides are unjustifiable on any grounds. Congress has provided elaborate machinery for handling disputes over recognition, bargaining rights, and alleged unfair labor practices. Those who turn to striking instead of using the procedures that Congress has provided certainly are not entitled to the immunity that they now enjoy under the Labor Act and other laws.

sections 8, 9, and 10 of this Act" and that the reference to these sections bespeaks a Congressional intent to include within the prohibition of Section 8(d) any type of strike, whether in support of contract termination or modification or in protest against unfair labor practices unrelated to contractual matters. The argument is merely a further projection of petitioners' erroneous insistence upon looking solely to the concluding sentence of Section 8(d) to determine the Congressional purposes.

Sections 8, 9 and 10 are the statutory provisions which implement the rights and remedies available to employees under the Act. Thus, Section 8 defines the type of employer conduct proscribed by the statute as unfair labor practices. Section 9 deals with the designation of bargaining representatives by employees, including the right of employees to petition the Board for a determination of bargaining representatives and the right to vote in representation elections. Section 10 empowers the Board, in relevant part, to prevent any person from engaging in the prohibited unfair labor practices and to direct such relief, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.

The reference to those sections in Section 8(d) makes specific the sanctions which Congress sought to impose upon employees participating in strikes called in violation of that Section. The legislative history of the Act suggests that Congress was aware that the Board, in determining whether

strike misconduct occurring in the course of a lawful strike deprived the participants of their reinstatement rights, had held that such misconduct did not necessarily cause a forfeiture of the strikers' right to reinstatement under the Act and that the question turned upon whether, in the light of all the circumstances, the misconduct was sufficiently serious to render the employee unfit for further employment or, stated differently, whether reinstatement would effectuate the policies of the Act.[33] With respect to Section 8(d) strikers, Congress did not wish to leave open to the Board the determination whether the reinstatement of such strikers would or would not in the particular circumstances effectuate the policies of the Act. Congress itself made that determination. Accordingly, it specified in the Section the sanctions which strikers would incur for failure to observe the "waiting period" requirements and made these sanctions automatic. Thus, the specification of these sanctions leaves unanswered the question as to the type of strikes to which they apply. The answer to that question must still be determined from the Section as a whole, particularly the provisions of the Section which precede the concluding sentence. So read, Section 8(d), as we have demonstrated, is limited to strikes over contract termination or modification and does not reach strikes in protest against an employer's unfair labor practices.

[33] See H. Rep. No. 245, 80th Cong., 1st Sess., p. 27, in 1 Leg. Hist. 318; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 38-39, in 1 Leg. Hist. 542-543.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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SEPTEMBER, 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage membership in any labor organization: * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating

a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period speci-

fied in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be

the employer unit, craft unit, plant unit, or subdivision thereof: * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that

such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

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